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Summary

GRAIN SERVICES UNION (CLC), APPLICANT;
AND ALBERTA WHEAT POOL, EMPLOYER

Board File: 555-3311

Decision No.: 907



Résumé de Décision

SYNDICAT DES SERVICES DU GRAIN (CTC),
REQUÉRANT, ET ALBERTA WHEAT POOL,
EMPLOYEUR.

Dossier du Conseil: 555-3311

Décision n° 907

These reasons deal with an application for certification affecting employees in the grain industry in Alberta and British Columbia wherein the union is seeking to represent employees in the primary country elevators operated by the employer. In its response to the application the employer submitted that the scope of the bargaining unit should extend to other areas of its operations. There were also constitutional jurisdiction questions raised about the Board's authority over certain parts of the employer's operations.

Les présents motifs portent sur une demande d'accréditation visant les employés du secteur du grain en Alberta et en Colombie-Britannique. Le syndicat requérant tente de représenter les employés qui travaillent dans les élévateurs régionaux exploités par l'employeur. Dans sa réponse à la demande, l'employeur a prétendu que la portée de l'unité de négociation devrait s'étendre à d'autres secteurs de son exploitation. Des questions ont été soulevées concernant la compétence constitutionnelle du Conseil sur certains secteurs de l'exploitation de l'employeur.

The application was granted. In its reasons the Board uses this opportunity to reaffirm its policies relating to applications for certification and in particular the need to provide meaningful opportunities for employees to participate in collective bargaining and not to frustrate the employees' rights by insisting upon artificial and unnecessary bargaining unit configurations. The Board also reminded the parties of its no vote - no hearing policies in the certification process.

The Board denied the employer's request to expand the bargaining unit and the Board also excluded part-time and casual employees so that the bargaining power of the full-time employees would not be diminished.

La demande a été agréée. Le Conseil a profité de l'occasion pour confirmer ses politiques relatives aux demandes d'accréditation. Il a fait ressortir la nécessité d'offrir aux employés de véritables possibilités de participation à la négociation collective et de ne pas les priver de leurs droits en insistant sur une structure de négociation artificielle et inefficace. En outre, le Conseil a rappelé aux parties sa politique de ne pas tenir de scrutin ni d'audience dans le processus d'accréditation.

Le Conseil a rejeté la demande de l'employeur portant sur l'expansion de l'unité de négociation. Il a exclu les employés à temps partiel et les occasionnels afin de ne pas restreindre le pouvoir de négociation des employés à plein temps.

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Reasons for decision

Grain Services Union (CLC),
applicant,
and
Alberta Wheat Pool,
employer.

Board File: 555-3311

The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances (on record):

Mr. Hugh J. Wagner, Secretary-Manager, for the applicant;

Ms. Bonnie DuPont, Director, Human Resources Division, for the employer.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

These reasons deal with an application for certification that was filed with the Board on May 22, 1991 by the Grain Services Union (CLC) (the union) seeking bargaining agent status to represent a unit of employees of Alberta Wheat Pool (the employer) described in the application as:

"all employees of Alberta Wheat Pool in the Provinces of Alberta and British Columbia who are: engaged in the operation of primary country elevators; and, engaged in the repair and maintenance of primary country elevators."

Excluded from the proposed bargaining unit are all persons employed in the Calgary Office of Alberta Wheat Pool; Area Managers; Regional Managers; Audit Supervisors; District Foreman; all persons employed in Alberta Wheat Pool Farm Supply Centres in the communities of Calgary; Camrose; Edmonton; Equity; Grande Prairie; Lethbridge; Red Deer; Strathmore; Vermillion and Westlock; and casual employees with less than sixty days of service with Alberta Wheat Pool"

The employer responded to the application taking numerous positions on the proposed bargaining unit, most of which developed into contentious issues between the parties. For example, the employer submitted that its Bean Plant at Bow Island is a primary country elevator and that the employees working there should be included in the bargaining unit. Issues of exclusion or inclusion were also raised about employees in the employer's Agro Centres and Farm Supply Centres and, the community of interest between these employees and the Agro Managers and Assistant Agro Managers who are physically located at primary country elevators became a topic of discussion for the parties. The employer also took issue with the inclusion of employees in its Facilities Engineering and Construction Department. Also, Seed Plants and the employer's Purchasing Warehouse at Calgary were also discussed in the submissions with different positions being taken over whether the employees working at those facilities should or should not be included in the bargaining unit.

Another major issue was how to deal with the employer's large contingent of part-time and casual employees. In its application the union had attempted to define casual employees to be excluded as those with less than sixty days of service with the employer. The employer described this proposition as artificial and impractical

and said that part-time employees ought to be included. The employer also submitted that the Board should apply the tests set out in Bank of Montreal, Sherbrooke, Quebec (1987), 69 di 102; 19 CLRBR (NS) 112; and 87 CLLC 16,044 (CLRB no. 621) to determine if any of the employees classed by the Board as casuals are in fact part-time and therefore qualified to be included in the bargaining unit.

Other issues raised by the employer included the constitutional jurisdiction of the Board to deal with parts of its operations such as the Agro Centres and Farm Supply Centres as well as its NH3 warehouse. The employer also requested that the Board determine the wishes of the employees in any bargaining unit that it found to be appropriate by holding a representation vote. In addition to its request for a vote, the employer submitted that a hearing was necessary to resolve all of the issues affecting the application.

By the time this matter was ready for preliminary consideration by this quorum of the Board in early November 1991, six months had passed since the application was filed. By then the written submissions on the foregoing issues had reached voluminous proportions. This kind of paper chase and the resulting unacceptable delay caused some concern for the panel and prompted us to issue these reasons to remind the parties and the community of the Board's policies and practices as they relate to certification procedures as well as the principles that are applicable to the issues raised in this application. One of the primary aims of adopting the procedures that are now in place was to avoid the kind of delay that has occurred here. It is

a well known fact that long delays in any labour relations situation are not compatible with the achievement of the purposes and objectives of the Code. This is particularly so in applications for certification where employees are attempting to exercise their rights under the Code for the first time. Any undue delay at this extremely sensitive time when the employees are so vulnerable to even the most subtle pressure from their employer can lead to a weakening of their resolve. Long delays can contribute to frustration and confusion among employee groups in these newly formed bargaining units which affects their morale and this of course works to the advantage of employers even after the bargaining agent gets over the certification hurdle and collective bargaining gets under way.

II

Starting with the employer's request for a hearing, it is a well known and long established practice of this Board to dispose of applications for certification without public hearings. This practice was implemented following the 1978 amendments to the Code which were primarily designed to diminish employer involvement in the certification process (see Canadian Imperial Bank of Commerce, Sioux Lookout (1978), 33 di 432; and [1979] 1 Can LRBR 18 (CLRB no. 158)). At that time the Board adopted the view (and still does today) that questions of appropriateness of bargaining units and exclusions therefrom on the basis of managerial functions or confidentiality are not questions of law which have to be resolved in a quasi-judicial setting. They are factual considerations that turn on the particular

circumstances of each case and which can be dealt with adequately through written submissions of the parties supplemented by a report from a Board Officer. This practice has been challenged on several occasions on grounds of denial of natural justice, however, all such proceedings have been dismissed by the Federal Court of Appeal (see Durham Transport Inc. v. International Brotherhood of Teamsters et al. (1978), 21 N.R. 20; Greyhound Lines of Canada Ltd. and Office and Professional Employees International Union, Local 458 (1979), 24 N.R. 382; C.S.P. Foods Ltd. v. Canada Labour Relations Board et al. (1979), 25 N.R. 91 and [1979] 2 F.C. 23; Canadian Arsenals Limited v. Canada Labour Relations Board et al. [1979] 2 F.C. 393; and Vancouver Wharves Limited (1984), F.C.A. A-918-84).

In this application the employer certainly raised many questions that generated a lot of paper and which, to the uninitiated, could appear to be rather complex. In reality, when they are taken separately, the issues are quite routine and all of them, with the exception of the jurisdiction issues which we shall deal with later on, can be dealt with quite adequately on the basis of the information on file.

Turning to the usual list of questions that the Board asks itself when dealing with applications for certification we start with the status of the applicant as a trade union within the meaning of the Code. This is normally a routine matter that is within the knowledge of the Board and its staff. The Board's practice is to require all applicants when they file their first application with the Board to submit their qualifying material which includes their constitution,

by-laws, charter, minutes of their founding meeting, etc. Once this has been examined by a quorum of the Board and trade union status has been acknowledged, there is no need for the union to qualify itself thereafter each time it is involved in proceedings before the Board. In this particular case, the union is well known to the Board and its qualifying material has been in the Board's possession for many years. The union is, without doubt, a trade union within the meaning of the Code.

Next, we turn to the Board's jurisdiction over the operations of the employer where the affected employees work. In this particular application the Board's jurisdiction is not in dispute vis-à-vis the bargaining unit applied for which basically includes employees working at primary country elevators. These are clearly elevators that are caught by the declaration under section 55 of the Canada Grain Act R.S.C. 1985 c.G-10 which makes them works that have been declared for the general advantage of Canada. This Board therefore has jurisdiction over labour relations matters affecting employees employed in the operations of the elevators (see Shur Gain Division, Canada Packers Inc. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), no. A-312-90, October 3, 1991 (F.C.A.)). Once we have dealt with the appropriate bargaining unit which is the next matter to be determined, it will become clear whether the constitutional jurisdiction challenge raised by the employer that relates to other parts of its operations need be addressed.

The Board's policy regarding the appropriateness of bargaining units in applications like we have here is well settled. Where unorganized employees are exercising their right to participate in collective bargaining the Board will provide a meaningful opportunity for them to do so and it will not frustrate these fundamental rights by insisting upon artificial or unnecessary bargaining unit configurations. In these situations the Board will accept bargaining units that are somewhat less than the most appropriate unit regardless of whether this might cause administrative inconvenience for the employer. (For an overview of these policies and an example of their practical application see Sedpex Inc. (1985), 63 di 102 (CLRB no. 543) and Purolator Courier Ltd. (1989), 77 di 1 (CLRB no. 730)).

In the instant application the foregoing principles come into play in determining the appropriate bargaining unit keeping in mind that this is an unorganized group of employees who have decided to opt for collective bargaining for the first time. The scope of the bargaining unit, which is a concern for both parties, can be resolved quite readily when one appreciates that the bargaining unit applied for consists of approximately 600 or so employees who are physically located at and are involved in the operations of primary country elevators. The nucleus of this unit consists of about 500 full-time employees. This is the core of the employer's elevator operational workforce. Obviously these employees share a strong community of interest and can easily be identified as a viable foundation for a collective bargaining relationship. What the employer is proposing is to extend the scope of the bargaining unit to many other areas of its operations including those very areas

over which it challenged the Board's constitutional jurisdiction. The employer supports its version of the appropriate bargaining unit with arguments about administrative and operational inconvenience. This is precisely the situation that was addressed in Purolator Courier Ltd., supra, where the Board permitted a trade union to carve out a small bargaining unit at Chatham and Windsor, Ontario, from of an employer's nationwide operations:

"Today, the Board is more aware in these situations and no longer applies strict bargaining unit principles of appropriateness when dealing with unorganized groups of employees. The Board's present policy in these situations was expressed in a letter decision in Board file 555-2494 which involved CALFAA and City Express.

'The panel's decision is that while it may agree that an all employee unit may be the most appropriate unit to convenience the employer's operations, that issue is outweighed by the more important consideration of affording a meaningful opportunity to the flight attendants to exercise their rights under the Code to participate in collective bargaining. The concerns of the employer about its practices of cross utilization is something that can be negotiated and the panel is convinced that it ought not to frustrate the rights of the flight attendants under the Code by insisting upon artificial or unnecessary bargaining unit configurations only because a lesser unit might inconvenience the employer. The Board therefore accepts the bargaining unit of flight attendants as an appropriate unit for the purposes of collective bargaining.'

(emphasis added)

This quorum of the Board concurs with these views and adopts the same rationale for the purposes of this application. While we are fully aware that the bargaining unit applied for is not the most appropriate unit, in the circumstances it is sufficiently identifiable and appropriate to provide the employees a realistic opportunity to exercise their rights under the Code."

(page 7; emphasis added)

To accept the employer's proposition in the present circumstances would, in our opinion, defeat the purposes of the Code rather than achieve them. Whether the employer intends it or not, the proposed enlargement of the scope of the bargaining unit would clearly diminish the opportunity for those employees in the unit applied for to have a realistic chance to participate in collective bargaining. In light of the Board's stated policies in this regard and in the absence of anything more compelling than inconvenience on the employer's part, the Board accepts as being appropriate for collective bargaining the unit for which the union applied, subject to some minor adjustments and some rulings about some disputed positions. (As we are dealing only with principles in these reasons and not specifics these rulings will be the subject of separate communications to the parties).

Before identifying the appropriate bargaining unit there is one other issue to be resolved to which the Board's policy of affording a meaningful opportunity to employees to exercise their rights under the Code is applicable. This is whether part-time and casual employees are to be included. In this regard, in addition to the cases already cited, we would refer to Canadian Imperial Bank of Commerce (Powell River Branch) (1991), 91 CLLC 16,014 (CLRB no. 843) where the Board set out its concerns about the impact of including casuals in bargaining units:

- "(1) The possibility of casual employees preventing full-time employees from having access to collective bargaining. This situation could arise where the full-time employees are outnumbered by casuals who may

not be interested in participating in collective bargaining. If the Board were to insist on the inclusion of casuals in these circumstances the smaller group of full-time employees who may opt for collective bargaining could have their attempts to do so vetoed by the contrary wishes of the casuals.

- (2) There is a possible negative impact on the free collective bargaining process if casuals are included because in most cases casual employees have a different community of interest from regular full-time or regular part-time employees. Obviously, the bargaining strength of regular employees would be considerably diluted if the bargaining unit was flooded with casuals. These casuals could not be expected to support strike action over issues such as seniority or pensions which have more impact on the employment of regular employees.
- (3) The Board is also hesitant to confer full collective bargaining rights, including the right to halt operations by strike action, on small groups of casual employees who only have a marginal connection with a given industry.

For these reasons as well as others, the Board has shown a preference for excluding casuals from bargaining units, particularly when dealing with new applications where there are no established collective bargaining relationships."

(page 14,027; emphasis added)

The same concerns can be extended here to part-time employees as well as to casuals. Because of the seasonal nature of certain parts of the employer's operations there is a large contingent of part-time and casual employees in the employer's workforce. These employees obviously cannot be expected to have the same attachment to or expectations from their periodic employment in the industry as do the full-time

employees. In fact, some of them probably have full-time careers elsewhere. A cursory review of the plethora of information on file showing the hours worked by the part-time and casual employees over a given period of time reveals that the normal tests for distinguishing casual employees that the Board has used in the banking sector for example, are simply not productive when applied in this industry. The large number of hours worked and the regularity of those hours during the high seasons makes it virtually impossible to draw a line between casual and part-time employees. For our purposes here they are practically one and the same.

To resolve this issue we have decided to exclude both groups, casual and part-time, from the bargaining unit. This would avoid an artificial and unnecessary flooding of the bargaining unit which would dilute the bargaining power of the full-time employees and, it would be in keeping with the goal of providing a meaningful opportunity for the full-time employees to participate in collective bargaining. This should also appease many of the people who indicated opposition to this application by way of petitions. A quick check of those petitions show that the bulk of the signatories come from the casual and part-time contingent. Should these people wish to exercise their rights under the Code at some future time, it should not be a difficult task to file an application seeking reconsideration of this question of appropriateness. Also, on the flip side, if the employer uses or expands this part-time and casual workforce to the detriment of the full-time employees, the union can also come back to the Board on this issue.

Taking everything into consideration and applying the specific rulings about certain inclusions and exclusions, the Board finds the appropriate bargaining unit to be:

"all full-time employees of Alberta Wheat Pool employed in the operations of primary country elevators in the Provinces of Alberta and British Columbia excluding repair, maintenance and construction employees, NH3 drivers, Area Managers and those above."

Having so found, the questions raised by the employer about the Board's jurisdiction over other areas of its operations become irrelevant and they need not be answered.

III

The focus now turns to the wishes of the employees in the bargaining unit that has been found to be appropriate for collective bargaining. Here, the Board is governed by section 28 of the Code:

"Duty to certify 28. Where the Board trade union

(a) has received from a trade union an application for certification as the bargaining agent for a unit,

(b) has determined the unit that constitutes a unit appropriate for collective bargaining, and

(c) is satisfied that, as of the date of the filing of the application or of such other date as the Board considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent,

the Board shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit."

(emphasis added)

It has not yet been determined just how the imperative language in section 28(c) fetters the Board's discretion whether to certify or not. Certain views were taken over the mandatory nature of the duty to certify by the full Board sitting in plenary session in Curragh Resources and Altus Construction Services Ltd. (1987), 70 di 186; 18 CLRBR (NS) 233; and 87 CLLC 16,034 (CLRB no. 640). These views were, however, expressed in the context of a given set of circumstances where a panel of the Board dismissed an application for certification when a union did have majority support on the basis of membership cards at the date of the filing of the application. A majority of the full Board said that this was an error in law. What that decision does not deal with is the Board's discretion to order a vote under section 29 in any case even if the union has a majority support on the face of the evidence of membership cards as of the date of filing. This question has not as yet been settled and, there is no need for it to be answered in this application. The union has illustrated a majority support among the employees in the bargaining unit by way of membership cards as of the date of filing which was May 22, 1991. The Board is satisfied as to that majority for the purposes of section 28(c), therefore, a certification order shall be issued.

This decision to certify is in keeping with the Board's policy and practices when it comes to ascertaining employee wishes in applications for certification where there are no existing collective bargaining relationships and no incumbent bargaining agent. The rule is to accept the expression of employee wishes using union membership cards as of the date of filing

of the application. This policy was adopted by the Board at the same time that public hearings were eliminated from the certification process following the 1978 amendments to the Code. At that time section 28(c) of the Code (then section 126(c)) was amended to establish the date of the filing of an application for certification as the primary date for determining the wishes of employees. The labour relations considerations behind these amendments were dealt with at great length in Sedpex Inc., supra, where the Board traced the evolution of section 28(c). That decision also sets out the differing views and considerations in the everlasting and still ongoing debate over the use of membership cards as opposed to representation votes to ascertain employee wishes. Suffice it to say for our purposes here that we concur with the bottom line of that decision which is a preference for reducing if not eliminating altogether the opportunity for employers to become involved in or to interfere with the freedom of choice of employees. The acceptance of membership cards as of the date of the filing of the application has accomplished this goal to a certain extent, however, there are still a few employers out there that refuse to accept the principles of collective bargaining enshrined in the Code and attempt to use their special position and relationship with the employees to interfere with their freedom of choice. (For some recent examples see Northern Cruiser Limited et al. (1990), unreported CLRB no. 828; Northern Beverages Ltd. (1991), unreported CLRB no. 885; and Clipper Navigation Limited (1991), unreported CLRB no. 900).

Although we have already said that the union will be certified on the strength of its support as of the date

of the filing of the application, there were two matters that should be addressed as they were considered in the overall context of employee wishes in this application. As we mentioned earlier, the Board did receive petitions, twelve to be exact, from employees indicating their opposition to the application. This is not an unusual response to the notices posted by the Board notifying affected employees of such an application. Seldom is there unanimity amongst employees about union representation. Some employees simply do not like unions, others like the idea of collective bargaining, they just do not want to be represented by the particular union that is applying and, there are those who sign both petitions and union cards to ensure they are on the right side no matter what the outcome. These petitions usually reflect the state of opinion generated by the union organization campaign. There are those for and those against. Rarely do these petitions substantively alter the snapshot which the Board has of the employee wishes as of the date of the filing of the application based on the percentage of employees in the bargaining unit who have signed union membership cards.

For those reasons and, with the determinative date being the date of filing there is seldom much weight attached to these petitions as they usually come in after the fact. Here, the petitions are even less significant because, as we pointed out, the bulk of the signatories are from the part-time/ casual contingent of the workforce which has been excluded from the bargaining unit. Even if they were included, the signatures on the petitions are almost exclusively from employees who never did sign union cards in the first place.

The other matter that we considered and ruled out as having little or no impact on the validity of the union's membership cards was a complaint that was filed by the employer on July 24, 1991, some two months after the application for certification was received by the Board. The allegations in the complaint went to alleged improprieties in the union's organizing campaign. It read as follows:

"We believe the code Sections 94 and 96 have been violated in the following manner:

- (1) *Representatives of the Grain Services Union on nine (9) occasions entered our facilities and persisted in attempts to convince employees to sign support cards. Individuals who engaged in that conduct were Lawrence Maier, Larry Hubich, and Walter Eberle.*
- (2) *GSU Representative, Larry Hubich, yelled at one of our employees who chose not to sign a card, and upon leaving spun gravel from his tires in the direction of the employee. The yelling occurred in our facility.*
- (3) *On at least one (1) occasion, the GSU Representative attempted to mislead employees by flashing a wad of five dollar bills with the comment 'look how many of your fellow employees have signed up'. In this case the individual, Lawrence Maier, resisted leaving the facility when asked to do so.*
- (4) *A GSU Representative offered to pay staff members' initiation fees in return for their signature on a card.*

We submit that this behaviour was in direct violation of the aforementioned sections of the Code. We seek as redress an order that a vote be conducted to determine whether the majority of employees in whatever unit is found to be appropriate support the Union; an order that the Union not be allowed to conduct business on our premises or during working hours and an order that representatives of the GSU cease and desist such behaviour."

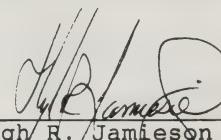
Looking at the allegations in this complaint which the union incidentally denies, only number (4) causes any real concern. The other allegations go to the union's presence on the employer's premises which is, of course, prohibited by the Code unless the employer consents. Even if this were true, it might perhaps call for a Board order to cease and desist but it would not invalidate any membership cards submitted by the union even if the specific employees who signed them on the company premises could be identified. Allegation number (4) on the other hand could have the effect of invalidating some union cards if it was shown that employees did not actually pay the required five dollar initiation fee on their own behalf. It is now, though, four months since the complaint was filed and, despite a request by the union for further particulars there has been none forthcoming from the employer. The allegation remains vague and unsupported and there is simply nothing there of substance that could be taken to cast serious doubt on the validity of the membership cards relied upon by the union. Furthermore, it is the normal practice for the Board's staff to make routine spot checks amongst the employees to determine whether union cards were signed voluntarily and that initiation fees were actually paid. No discrepancies have been reported by our Officer and, most telling of all, there have been no complaints by employees on their own behalf about the union's organizing campaign. This is where complaints of this nature should come from, not from employers who really have no business being in the realm of employee wishes. (See K.D. Marine Transport Ltd. (1982), 51 di 130; and 83 CLLC 16,009 (CLRB no. 400)). In short, the Board attached little or no weight on either the petitions from the employees or upon the

complaint by the employer when the determination was made vis-à-vis the wishes of the employees.

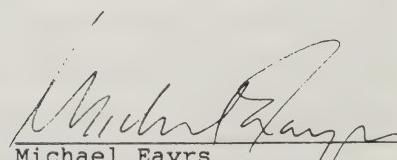
To make doubly sure that there is no misunderstanding, it should be made clear that we are not disposing of the complaint in Board file 745-3982 here. Should the employer wish to pursue it regarding the union's alleged unlawful intrusion upon its premises for the purposes of organizing it is free to do so. All that we are saying here is that the remedy sought by the employer that a vote be taken in this certification application will not be granted on the basis of the allegations in the complaint. Should the complaint proceed, any other remedies available under the Code are still there for the employer if a violation of section 94 or 96 is found.

The application for certification is granted.

The foregoing is a unanimous decision of the Board.


Hugh R. Jamieson
Vice-Chair


Calvin B. Davis
Member


Michael Eayrs
Member

DATED at Ottawa this 27th day of November, 1991.

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Summary

GENERAL TRUCK DRIVERS AND HELPERS, LOCAL UNION NO. 31, GENERAL TEAMSTERS, LOCAL UNION 362, GENERAL TEAMSTERS, LOCAL UNION 979, TEAMSTERS UNION, LOCAL 938, AND TRANSPORT DRIVERS, WAREHOUSEMEN AND GENERAL WORKERS' UNION, LOCAL 106, APPLICANTS; AND SERVALL TRANSPORT LIMITED AND SERVALL AMERICA INC., RESPONDENTS.

Board Files: 560-267
585-436
745-3961

Decision No.: 908



These reasons deal with applications under the sale of business provisions in section 44 of the Code and the single employer provisions in section 35 of the Code. They also deal with a related complaint of unfair labour practices.

The circumstances giving rise to the applications and the complaint go to the effect of the Free Trade Agreement with the U.S.A. on the trucking industry. In this case, Servall Transport Limited created a mirror operation in the States named Servall America Inc. The Teamsters allege that this was done to avoid Servall Transport Limited's obligations under its collective agreement. The Teamsters sought remedies from the Board that included a declaration under section 35 that Servall Transport Limited and Servall America Inc. were a single employer for the purposes of the Code and that Servall America Inc. is bound by the Teamsters collective agreement. The Teamsters also alleged that a sale of business had taken place within the meaning of section 44 of the Code and that successor bargaining rights applied to Servall America Inc. The unfair labour practice complaint was based on the Teamsters' allegations that Servall Transport Limited had infringed upon the rights of its members and had thus violated certain sections of the Code.

Résumé de Décision

LES SECTION LOCALES 31 (GENERAL TRUCK DRIVERS), 362 (GENERAL TEAMSTERS), 979 (GENERAL TEAMSTERS) ET 938 DU SYNDICAT DES TEAMSTERS, ET L'UNION DES CHAUFFEURS DE CAMIONS, HOMMES D'ENTREPÔTS ET AUTRES OUVRIERS, SECTION LOCALE 106, REQUÉRANTES, AINSI QUE SERVALL TRANSPORT LIMITED ET SERVALL AMERICA INC., EMPLOYEURS INTIMÉS

Dossiers du Conseil: 560-267
585-436
745-3961

Décision n° 908

Les présents motifs de décision traitent de demandes présentées en vertu des dispositions du Code portant sur les ventes d'entreprises (article 44) et les employeurs uniques (article 33), ainsi que d'une plainte de pratique déloyale de travail connexe.

Les circonstances qui ont donné lieu aux demandes et à la plainte découlent des conséquences de l'accord canado-américain de libre-échange sur le secteur du camionnage. En l'espèce, Servall Transport Limited a créé une entreprise jumelle aux États-Unis, appelée Servall America Inc. Le syndicat des Teamsters allègue que Servall Transport Limited a mis cette entreprise sur pied afin de se désister de ses obligations en vertu de la convention collective. Il tente d'obtenir du Conseil des mesures de redressement, y compris une déclaration fondée sur l'article 35 selon laquelle Servall Transport Limited et Servall America Inc. sont un employeur unique pour les besoins du Code et que Servall America Inc. est liée par la convention collective des Teamsters. Le syndicat des Teamsters allègue également qu'il y a eu vente d'entreprise au sens de l'article 44 du Code et que les droits du successeur au chapitre de la négociation s'appliquent à Servall America Inc. La plainte de pratique déloyale de travail se fonde sur les allégations du syndicat selon lesquelles Servall Transport Limited a empiété sur les droits de ses membres et a donc violé certaines dispositions du Code.

The applications under sections 35 and 44 of the Code were dismissed. The Board found that the American owner-operators hauling loads into and out of Canada for Servall America Inc. do not fall within the jurisdiction of this Board. The complaint of unfair labour practices was also dismissed. The Board found that in the absence of anti-union animus, the spinning-off of Servall America Inc. was a legitimate cost-cutting measure which does not offend section 94(1)(a) of the Code as alleged.

Les demandes présentées en vertu des articles 35 et 44 du Code ont été rejetées. Le Conseil juge que les chauffeurs-exploitants américains qui transportent des chargements destination ou en provenance du Canada pour Servall America Inc. ne relèvent pas de la compétence du Conseil. La plainte de pratique déloyale au travail est également rejetée. Le Conseil juge que, en l'absence de sentiment antisyndical, le fait d'avoir mis sur pied une nouvelle entreprise (Servall America Inc.) constitue une mesure légitime de réduction des coûts qui ne viole pas l'alinéa 94(1)a) du Code comme il a été allégué.

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Reasons for decision

General Truck Drivers and
Helpers, Local Union No. 31,

General Teamsters, Local Union
362,

General Teamsters, Local Union
979,

Teamsters Union, Local 938,
and

Transport Drivers, Warehousemen
and General Workers' Union,
Local 106,

applicants,

and

Servall Transport Limited,

and

Servall America Inc.,
respondents.

Board Files: 560-267
585-436
745-3961

The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances:

Mr. Douglas J. Wray, for the applicants; and
Mr. Larry Bertuzzi, for the respondents.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

On June 17, 1991 the following Teamster Local Unions, Local 31 from Vancouver, Local 362 from Calgary, Local 979 from Winnipeg, Local 938 from Toronto, and Local 106

from Quebec (the unions or the Teamsters) filed two applications with the Board. One was under the sale of business successor provisions in section 44 of the Code and the other under the single employer provisions in section 35 of the Code. The unions alleged that Servall Transport Limited (Servall Transport) had sold its business within the meaning of section 44 of the Code to Servall America Inc. (Servall America) and also that the collective agreement between the unions and Servall Transport is now binding upon Servall America. In the alternative, the Teamsters say that Servall Transport and Servall America constitute a single federal work, undertaking or business for the purposes of section 35 of the Code and that the aforesaid collective agreement is binding on both.

On the same date, June 17, 1991, the Teamsters also filed a complaint against Servall Transport under various unfair labour practice sections of the Code including 94(1)(a), 94(3)(a), 94(3)(b), 94(3)(e), and 96. Here the unions alleged that Servall Transport had contravened those provisions of the Code by transferring some of its operations to Servall America to avoid its collective bargaining obligations.

The remedies sought include compensation to the unions and/or to the union members, and a declaration that Servall America is bound by the aforesaid collective agreement and also that the Teamsters have bargaining rights for the employees of Servall America.

Servall Transport denied the allegations in the complaint and said that in any case the complaint is untimely in respect of the 90-day time limits under

section 97(2) of the Code. Servall Transport and Servall America responded to the applications under sections 44 and 35 of the Code by denying their merit and challenging the Board's jurisdiction over Servall America. They say that it is an American corporation which is subject to the laws of the U.S.A and as such it is not a federal work, undertaking or business for the purposes of Part I of the Code.

The Board heard these matters at Toronto on October 22 and 23, 1991.

II

Since 1972 Servall Transport has been in the business of intra-provincial, inter-provincial and international transportation of general freight by the truckload. It is part of the Transport Group of Federal Industries (Federal) that includes C.F. Kingsway Inc. and Kingsway Transport Limited to which we shall be referring later on in these reasons. Servall Transport operates terminals at Montreal, Toronto, Winnipeg, Calgary, Edmonton and Vancouver. Truckload transportation of general freight is essentially shipper to consignee with no terminal handling of freight, therefore, these terminals are mainly for office and dispatch purposes with some limited yard space available for trailer parking. Servall Transport also operates similar terminals at Avenal, New Jersey, and Chicago, Illinois in the United States. Servall Transport has its head offices at Mississauga, Ontario which also happens to be the hub for administrative services for several other

companies which make up the Truckload Division of Federal. Payroll and other such financial and accounting services are centralized at 880 Middlegate Road, Mississauga.

Prior to 1991, Servall Transport operated with a fleet of tractors leased to and operated by a workforce of some 350 owner-operators who are represented by the Teamsters. The unions obtained bargaining rights for all owner-operators employed by Servall Transport by virtue of voluntary recognition back in 1975. The current collective agreement between the unions and Servall Transport has been in effect from March 1, 1990 and remains in force until February 28, 1993. This agreement was arrived at in December 1990 and signed in early January 1991.

Many of the owner-operators working for Servall Transport are approved by the Interstate Commerce Commission of the United States (I.C.C.) to haul goods into and out of the U.S.A.. Since 1984, in addition to the Canadian owner-operators, Servall Transport has also used a small contingent of United States residents as owner-operators to haul truckloads of general freight from the States into Canada and back to the States. These U.S. owner-operators were paid in U.S. funds and their employment was subject to the laws of the States vis-à-vis income taxes and the likes. The U.S. owner-operators were not included in the bargaining unit represented by the Teamsters. In fact, during contract negotiations in 1986-87 the Teamsters attempted to expand the scope of the collective agreement to the American owner-operators but Servall Transport refused.

The collective agreement does not and never has affected the American owner-operators or, for that matter, any of Servall Transport's terminal operations in the States.

In March, 1990 during the negotiations with the Teamsters for the current collective agreement Servall Transport sought relief from the unions because of its deteriorating financial position. According to Servall Transport it was losing money mainly because of the influx of American carriers that have come into Canada since the Free Trade Agreement. The Teamsters refused to give any concessions so Servall Transport turned to other ways to become competitive in today's market where it was losing major accounts to American businesses. Mr. Siegfried Goetz, recently retired Vice-President and General Manager of Servall Transport and of Servall America, told the Board that a major consideration was the inability of Servall Transport to do domestic work in the States. Mr. Goetz explained that if a load was hauled from Toronto to Houston, Texas and there was no load available at Houston to come direct back to Canada the truck would have to run empty to the nearest point where a truckload was coming direct to Canada. At times this would mean an empty run from Houston to New York for which the driver is still paid. American companies, on the other hand, could do inter-State domestic runs on their way to pick up international loads for delivery in Canada. The empty runs accounted for approximately 17% of Servall Transport's miles in the U.S.A.. According to Mr. Goetz these empty miles in the U.S.A. cost Servall Transport over one million dollars in 1990.

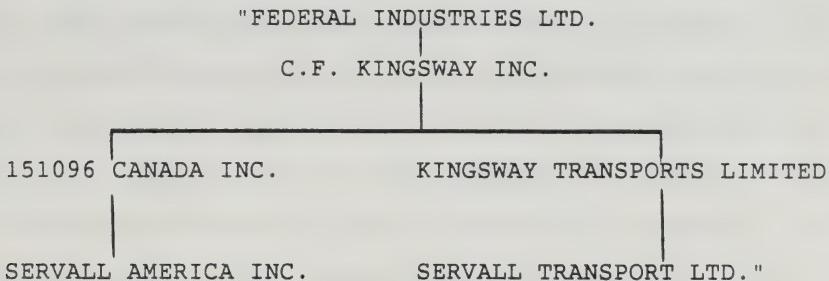
There were other disadvantages for Servall Transport that made it difficult to compete against the large U.S. companies and also against some other major Canadian trucking companies that were already double-breasting with spin-off companies in the U.S.A.. Mr. Goetz told the Board about the cheaper cost of tractors and trailers in the States. Apparently, tractors which cost over \$100,000 in Canada can be purchased for about \$60,000 in the States. There are also better depreciation and tax write-offs on equipment and, the operational costs are less on account of the cheaper price of fuel and lower cost of living in the States for the resident owner-operators.

According to Mr. Goetz it became a matter of survival for Servall Transport in today's deregulated marketplace. In the face of the competition, and with no relief from the Teamsters and little hope of higher rates from its remaining customers, a corporate decision was taken in the fall of 1990 to set up a mirror company in the United States. Servall America was born!

III

Servall America is a U.S. corporation registered in the State of Delaware. Its head office is at 880 Middlegate Road, Mississauga, Ontario. The Board of Directors of Servall America and Servall Transport are common. Servall America's payroll and financial and accounting services are provided through the same central hub of

Federal as Servall Transport's. Documents before the Board illustrate the corporate relationship between Servall America and Servall Transport as follows:



Servall America became operational in February, 1991. The first step that was taken was for Servall Transport to terminate its contracts with the twelve or so U.S. based owner-operators. Recruiters based at New Jersey and Chicago then advertized, interviewed and entered into contracts with American domiciled owner-operators on behalf of Servall America. Eight of the owner-operators previously under contract with Servall Transport signed on with Servall America. By October 1991, the number of U.S. resident owner-operators working for Servall America had increased to sixty-five. These owner-operators supply tractors under lease arrangements to Servall America. They haul trailers that are leased by Servall America from independent U.S. sources and they are engaged in U.S. domestic interstate as well as international transportation of general freight by the truckload. They are dispatched mainly from the terminals in New Jersey and Chicago. When they haul into Canada their return trips to the U.S.A. are dispatched from Toronto.

At the present time, Servall America operates in the U.S. under the running authorities of C.F. Kingsway Inc., which is an American company. In Canada, it operates under the authorities of Kingsway Transport Limited. Applications have been made to the relevant agencies in both the U.S. and Canada and the appropriate licences and permits have been obtained for Servall America to operate under its own authorities on both sides of the border. This transition has been delayed to the beginning of the new licencing year in January 1992 because of cost factors which we need not go into. Mr. Goetz told the Board that Servall America is still in its infancy and it is expected to grow dramatically in the U.S.A. He also stated that the terminal operations presently being operated by Servall Transport at New Jersey and Chicago will be transferred to Servall America in the upcoming fiscal year in 1992.

It is Servall America's activity in and out of Canada that is at the root of the Teamster's complaint and applications to the Board. As these operations increase, particularly in the north/south lanes of the eastern seaboard between New York State and Ontario, the unions are claiming that more and more of the work that was done by their members is now going to the American owner-operators. The unions say that the previous practice of first in and first out of Toronto for dispatch purposes has been changed and Americans are now getting the longer runs into the States while their Canadian members are being assigned to the shorter runs to the Northern States. In fact, there are grievances pending over these alleged dispatch changes. Also, the unions point to the increase of owner-operators with

Servall America since February 1991 compared with the decrease of their bargaining unit size from some 300 in 1990 to about 262 in October 1991. This, says the unions, shows where the work is going.

Servall Transport denied that there is a deliberate move to direct work to Servall America although it did admit it would be cheaper to do so. It was, however, admitted that in certain circumstances dispatch now depends on the economics of the trip. If there is a long haul to the central or southern States with no direct backhaul to Canada, these runs are assigned to Servall America owner-operators who can work their way back with inter-State domestic loads. This eliminates or at least reduces the empty mile runs. According to Mr. Goetz, this is the new economic reality. Servall Transport does domestic Canadian and international runs to and from the States; Servall America does domestic U.S. and international runs to and from Canada. This, says Mr. Goetz, is the only way that the companies can survive. He also pointed out that Servall Transport did not desert Canada like so many other companies have since the Free Trade Agreement. Many have simply closed up shop in Canada and now operate solely out of the States. Servall Transport has kept its Canadian operations going and, although it may be a slimmer operation, it is foreseen that Servall Transport will survive for years to come.

Although the question of the Board's jurisdiction over Servall America affects both Teamster applications, we

shall deal first with the single employer application under section 35:

"35. Where, in the opinion of the Board, associated or related federal works, undertakings or businesses are operated by two or more employers having common control or direction, the Board may, after affording to the employers a reasonable opportunity to make representations, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business."

We do so only to highlight that the circumstances here are a classic example of the type of corporate spin-off activity that these provisions of the Code were designed to catch. The syphoning off of bargaining unit work to an associated or related spin-off non-unionized company is about all that is required for the Board to make a single employer declaration. In these situations, anti-union animus is not a prerequisite, it is the detrimental effect on existing collective bargaining rights that is the key. (See Transport Route Canada Inc. and Express Dorchester Inc. (1987) 70 di 153; and 17 CLRBR (NS) 340 (CLRB no. 638) for an overview of the Board's policies and approach to single employer declarations).

Here, we have some of the ingredients for a section 35 declaration but there is a crucial one missing. The prerequisite of federal works, undertakings or businesses that are operated by two or more employers having common control or direction cannot be met. There is only one employer here, Servall Transport. No matter how high the corporate veil is lifted or how many elements such as corporate association, common

directors, shared administrative services, operational integration vis-à-vis sales, dispatch or terminals in both Canada and the U.S.A. are argued about, one cannot escape the reality that the Teamsters want us to ignore. Servall America is simply not an employer within the meaning of the Code. As it is presently structured, its employees do not fall within the jurisdiction of this Board.

The short route to this conclusion is to ask the Teamsters if, over the years during which its Canadian domiciled members have been running into and out of the States for Servall Transport, did they come under the jurisdiction of the National Labour Relations Board for labour relations purposes in the U.S.A.? Could they have been organized by Teamster Locals in the States for representation purposes? The answers are clearly no. When the Canadian drivers venture into the States they are obviously subject to federal and state laws such as customs and excise as they enter and depart, criminal laws, highway traffic laws, equipment standards regulations, pollution laws and so on. For labour relations purposes though they still come under Part I of the Code, just as, for example, crews of Canadian aircraft when they fly internationally. It is the same scenario in reverse for American owner-operators employed by Servall America when they venture into Canada.

Notwithstanding that Servall America's address is Mississauga, Ontario, it is still a United States of America, State of Delaware corporation. Its business affairs are handled according to U.S. law. It files all of the required annual and other periodic financial

statements and returns to Washington, D.C.. The primary place of employment for its employees is the U.S.A.. They are all recruited, hired and domiciled in the States. They are paid in U.S. funds and their employment conditions are handled in accordance with U.S. laws and, while no one actually said so, we would assume that the Owner-Operator Agreements or Equipment Lease Agreements entered into by these owner-operators with Servall America would be subject to interpretation under U.S. law vis-à-vis their status as employees or independent contractors. In short, Servall America has no Canadian resident employees who could fall under the Code.

We are not saying, of course, that in other circumstances Servall America could not be considered to be a federal work, undertaking or business for the purposes of Part I of the Code. This Board has granted applications for certifications by trade unions seeking bargaining agent status for employees of American corporations working in Canada. An example that readily comes to mind is in the airline industry where entities such as American Airlines, United Airlines, and Delta Airlines employ Canadian residents to work at their operations at Canadian airports. The Board has, in those circumstances, certified bargaining units of reservations clerks, ramp attendants and other employees performing ground crew functions. The difference there, of course, is that those American corporations have brought themselves within the scope of the Code by employing resident Canadians to work in Canada in the field of aeronautics which is a matter of federal jurisdiction. Servall America, on the other hand, while it may be in the business of international truck

transportation which also falls within the federal domain, has no Canadian resident employees, therefore, it cannot be considered to be an employer for the purposes of Section 4 of the Code.

As much as the Teamsters urged us to find ways to apply the provisions of Part I of the Code to the American owner-operators hauling loads into and out of Canada for Servall America, it is our respectful opinion that there simply are none. Without such a finding there is no option but to dismiss the application by the Teamsters under section 35 of the Code. It naturally follows that the application under section 44 of the Code affecting Servall America must also be dismissed for the same absence of an employer-employee relationship within the reach of the Code. It is pointless to speak about successor rights under these provisions of the Code when there is no employer and no employees to whom those collective bargaining rights could attach.

V

Servall Transport is, without question, a federal work, undertaking or business and an employer for the purposes of the Code and the Board's jurisdiction to deal with the unfair labour practice complaint is not at issue.

To begin with we shall set aside for the time being the issue of timeliness under section 97(2) of the Code which turns on certain facts going to when the Teamsters became aware of or, in the words of the Code, ought to have known of the actions or circumstances giving rise to the complaint. There is also a question here of

whether the bases for the complaint arise from an ongoing or continuous obligation under the Code which could affect the 90-day time limit in section 97(2). Rather than spend a lot of time on these questions we would rather deal with the merit of the complaint and put the issue to rest in the interests of stabilizing the longstanding and continuing labour relationship between these parties.

What the unions are alleging is that Servall Transport interfered with the Canadian owner-operators' basic rights and freedoms under section 8 of the Code by diverting bargaining unit work to Servall America to avoid its obligations under the collective agreement. Such interference, says the union, is a violation of the various sections of the Code referred to in the complaint. In other words, the issue boils down to the question of whether an employer that is bound by a collective agreement can take action to cut costs by moving bargaining unit work to a related or associated employer without running afoul of the Code.

There is a helpful summary in Bernshire Mobile Maintenance Ltd. (1984), 56 di 83; 7 CLRBR (NS) 21; and 84 CLLC 16,036 (CLRB no. 465) setting out the primary considerations that arise when dealing with this type of complaint. There, the Board was faced with a situation where an employer contracted out maintenance work to cut costs after the union that represented the maintenance workers had refused to consider a request for some relief under the applicable collective agreement. The Board found that there was no violation of section 184(1)(a) of the Code (now section 94(1)(a)) in the circumstances there which were really quite

similar to what we have now except, the other employer receiving the bargaining unit work in that case was not associated or related.

One of the primary considerations in the Bernshire case was the absence of anti-union animus. In other words, there was no opposition to the right of employees to participate in collective bargaining. For these purposes the Board defined what it meant by anti-union animus:

"We should clarify what we mean by an absence of anti-union animus. It is not every claim to economic justification that can fairly be characterized as untainted by anti-union animus. A general assumption that it is cheaper to operate union free or a calculation that it is more efficient not to have to face the risk of a strike would, if acted upon, directly challenge the fundamentals of workers' right to organize and bargain collectively. This would clearly amount to anti-union animus."

(pages 91-92; 29-30; and 14,312)

After reviewing some previous decisions of this Board and of the Ontario Labour Relations Board on this point, the Board concluded:

"We subscribe to the rationale of those cases. Where the employer, without any opposition to the right of employees to engage in collective bargaining, simply tries to cut costs, we do not think it can fairly be said that the employer is motivated by anti-union animus. On that assumption, although contracting out does in a very real sense deprive employees of their right to be represented by a bargaining agent, it must be balanced against the legitimate economic interests of employers. The question of contracting out to cut costs is a matter for negotiation. We conclude that contracting out, undertaken solely in order to cut costs and without anti-union animus, while it could be a violation of a collective agreement, is not a violation of section 184(1)(a) (now section 94(1)(a))."

(pages 95; 33; and 14,314; emphasis added)

We concur with and adopt the same principles here where there has been action taken to spin off a related company to cut costs as opposed to the contracting out situation in the Bernshire case. No matter what term is used, the bottom line of the allegations are still the same, the purported movement of work out of the scope of the bargaining unit.

In this complaint the Teamsters referred to other sections of the Code in addition to section 94(1)(a). These included sections 94(3)(a), 94(3)(b), 94(3)((e)) and 96. It only takes a quick reading of those other provisions of the Code to conclude that they are not applicable to the circumstances before us. For example, section 94(3)(b) refers to a prohibition against employers from imposing conditions in a contract of employment that restricts employees from exercising their rights under the Code and, section 94(3)(e) speaks of employer intimidation or threats of retribution intended to compel employees not to become or to continue to be members of trade unions. There is nothing in this complaint that is remotely connected with either of those subject matters. Also, even with the extremely broad language of sections 94(3)(a) and 96 which are aimed at protecting employees who exercise their rights under the Code, it is difficult to bring the present circumstances into focus under these provisions. In fact, counsel for the unions did not really seriously pursue these sections of the Code in argument. Clearly, we are only dealing with one section of the Code, section 94(1)(a):

"94. (1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union;"

(emphasis added)

Looking at the facts and circumstances of this complaint there is nothing before us to support the notion that the creation of Servall America was motivated by anti-union animus. This is a longstanding voluntarily recognized collective bargaining relationship between Servall Transport and the Teamsters and we saw nothing to indicate that Servall Transport is opposed to its Canadian owner-operators continuing to be engaged in collective bargaining. This case can therefore be characterized as the Board put it in Bernshire Mobile Maintenance Ltd., supra, as one where the legitimate economic interests of an employer must be weighed against the interests of the union and its members.

The Board referred to this balancing of interests in Canadian Imperial Bank of Commerce, North Hills Shopping Centre and Victoria Hills Branches (1979), 34 di 651; [1979] 1 Can LRBR 266; and 80 CLLC 16,001 (CLRB no. 173).

"If anti-union animus were not an element of a section 184(1)(a) (now section 94(1)(a)) violation then the Board would have to balance legitimate union, employee and employer interests in any given case. On the one side would be the business justification or significant or legitimate reasons for the employer's conduct. On the other would be the individual employee or union pursuit of rights and freedoms under the Code. These would have to be assessed in the realistic light of the adversarial economic conflict of collective bargaining, as the Board did in The Royal Bank of Canada, Kamloops and Gibsons Branch, supra where the employer's actions were justified

by legitimate collective bargaining interests. In some marginal cases where the balance is equal motive may be a determinative factor."

(pages 671; 281; and 14,013; emphasis added)

We should make it clear that at no time did Servall Transport concede that bargaining unit work has been syphoned off to Servall America. Nor was there any concession that the decrease in the number of owner-operators with Servall Transport was caused by the hiring of American owner-operators by Servall America. Mr. Goetz was consistent throughout his testimony that no work had been moved from Servall Transport to Servall America. He pointed out repeatedly that there always had been, at least since 1984, American owner-operators who did the work now being done by Servall America.

The only thing that has changed today is that now they also do domestic inter-State work. Mr. Goetz attributed the decrease in Canadian owner-operators to a natural consequence of the downturn of work. He implied that what has happened has been the result of attrition. No one has been laid off and the percentage of voluntary terminations during 1991 has been about average. The difference is that no one has been hired as replacements because of the poor economic climate. It is against these denials and the unions' claims to the contrary that we weigh the interests of the parties in the realistic light of the adversarial economic conflict of collective bargaining.

Like in the Bernshine case which incidentally also involved the Teamsters Local 979 from Winnipeg, the

legitimate interests of the parties are significant. Servall Transport hopes to cut costs and to regain its economic losses. The Teamsters are determined to hold the line and not give back anything that has taken long years of collective bargaining to achieve. To this end, the Teamsters took a hard-line when it came to concessions and to us, this is the key. It is not in dispute that Servall Transport did approach the Teamsters with cap in hand during the 1990 negotiations for the renewal of the collective agreement seeking relief from its obligations under the collective agreement, particularly in the area of the empty miles being run in the States. The unions' abrupt response to the effect that Servall Transport should not be in business if it cannot make money, pretty well decides the balancing of interest question for us. The Teamsters clearly spurned the opportunity to become involved and to at least attempt to do something about Servall Transport's economic crises through the medium of collective bargaining. Having done so, the unions can hardly come to the Board and cry foul now because Servall Transport took unilateral steps to look after its own interests.

An often forgotten reality of our free collective bargaining system is that one can get hurt. Hard-line and inflexible positions at the bargaining table can often result in serious consequences. Employers can be forced out of business and employees can find themselves without jobs:

"...But there may be losers in the fullest sense of the word. That party that has miscalculated its capacity for economic resistance may lose everything: an employer may jeopardize the existence of his business,

and union members and unions may jeopardize their positions and their existence, respectively. Generally speaking, this is the law. It is this ever latent and genuine possibility that is the system's ultimate mechanism for rendering the parties reasonable, lucid and responsible.

This system, with the parameters described above, has existed for many years and employers, unions and union members are expected to be familiar with all its mechanisms, details, implacable logic and pitfalls; otherwise, they must accept the sometimes disastrous consequences."

(CJMS Radio Montréal Limitée (1978), 27 di 796; [1979] 1 Can LRBR 332 (CLRB no. 160) at pages 833; and 364)

Being well aware of the maturity of the parties involved here we can only assume that the Teamsters did consider the options open to Servall Transport when the hard-line position was taken at the bargaining table and that what we see here is one of those developments that are brought on by circumstances beyond the control of the parties when they have gone as far as they can go and the time for compromise has run out. Perhaps the Teamsters saw the writing on the wall and, even if they had given in and granted relief vis-à-vis the empty miles (which we realize would have been an almost impossible sell to the membership), the creation of Servall America or a similar alternative would have been inevitable. This is sometimes what collective bargaining is all about. Therefore, we do not mean to leave the impression here that we are placing the blame at the feet of the Teamsters. What we are saying is that the economic situation facing the parties was addressed at the bargaining table and, whatever consequences flow from that is not something that this Board should interfere with particularly where there are no anti-union motives on the part of Servall Transport

or other considerations of an extraordinary nature that directly affect the rights of the employees or of the unions under the Code.

In the given circumstances it is unnecessary for us to deal definitively with the differing views of the parties about the true cause of the decreasing size of the workforce at Servall Transport or whether work that was done by Servall Transport owner-operators is now being done by Servall America. We are satisfied that the spinning off of Servall America was undertaken solely as a legitimate cost cutting measure which, in the absence of anti-union animus, does not offend section 94(1)(a) of the Code. This conclusion removes the need for us to decide about the timeliness of the complaint.

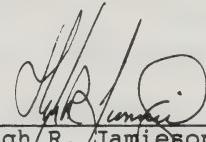
The Teamsters also raised one other issue at the hearing that deserves comment. This was the lack of disclosure by Servall Transport, particularly during December 1990 and in early January 1991, when negotiations were in the final stages and while the plans to create Servall America were being implemented. Mr. Goetz' response to this was unequivocal. The Teamsters were told nothing about Servall America. The unions had turned him away when he sought relief and he saw no obligation to tell them about corporate plans affecting business areas outside the scope of the unions' bargaining rights defined in the collective agreement.

The Board's response to this question of disclosure in these circumstances is that it goes to bad faith bargaining about which we have no complaint. Nor do we have the necessary Ministerial consent under section

97(3) of the Code which would enable us to deal with such a complaint. We need not, therefore, decide whether Mr. Goetz' opinion is correct about Servall Transport's obligation vis-à-vis disclosure at the bargaining table.

In summary, the Board finds that Servall America is not an employer within the meaning of the Code, therefore, the applications under section 44 and 35 of the Code are dismissed. The unfair labour practice complaint by the union is also dismissed as being without merit.

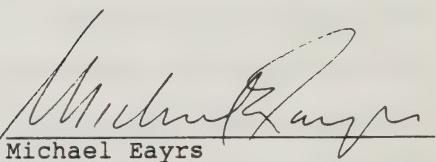
The foregoing is a unanimous decision of the Board.



Hugh R. Jamieson
Vice-Chair



Calvin B. Davis
Member



Michael Eayrs
Member

DATED at Ottawa this 29th day of November, 1991.

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Summary

BERMILINE JOLLY, COMPLAINANT,
AND CANADA POST CORPORATION,
EMPLOYER.

Board File: 950-194

Decision No.: 909

These reasons deal with a complaint under the safety and health provisions of Part II of the Canada Labour Code against Canada Post Corporation. Ms. Bermilene Jolly complained that Canada Post had disciplined her contrary to section 147(a) of the Code because she had exercised her right to refuse to handle a monotainer of foreign parcels on the grounds that there was a danger to her health and safety.

The complaint was upheld. The Board believed that the complainant had a genuine belief that the foreign parcels were giving her an allergic reaction and causing her to itch.

The Board also found that the employer never followed the procedures as laid down in Part II of the Code when a refusal occurs.

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Résumé de Décision

BERMILINE JOLLY, PLAIGNANTE,
ET LA SOCIÉTÉ CANADIENNE DES
POSTES, EMPLOYEUR.

Dossier du Conseil: 950-194

Décision n° 909

Les présents motifs portent sur une plainte déposée en vertu du Code canadien du travail (Partie II - Sécurité et santé au travail) contre la Société canadienne des postes. M^{me} Bermilene Jolly se plaint que l'employeur lui a imposé des mesures disciplinaires en violation de l'alinéa 147a) du Code parce qu'elle avait exercé son droit de refuser de manutentionner un monoteneur contenant des colis de l'étranger; cette tâche, selon elle, constituait un danger pour sa santé et sa sécurité.

La plainte a été confirmée. D'après le Conseil, la plaignante croyait sincèrement que les colis de l'étranger avaient provoqué chez elle une réaction allergique et des démangeaisons.

Le Conseil a aussi jugé que l'employeur ne s'était pas conformé aux marchés à suivre énoncées dans la Partie II du Code concernant les refus de travailler.



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Relations
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Conseil
Canadien des
Relations du
Travail

REASONS FOR DECISION

Bermiline Jolly,

complainant,

and

Canada Post Corporation,
employer.

Board File: 950-194

The Board consisted of Mr. Calvin B. Davis, Member, sitting as a single member panel, pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances:

Mr. David I. Bloom, for the complainant; and
Mr. Ian Szlazak, for the respondent.

The Board has before it a complaint filed pursuant to section 133(1) of the Code, by an employee of the Canada Post Corporation (CPC), Bermiline Jolly, alleging that she had been disciplined contrary to section 147(a) for exercising her right to refuse unsafe work pursuant to section 128(6).

The Board heard the matter on October 16 and 17, 1991, at its offices in Toronto.

The complainant, is a mail sorter at CPC's Gateway Bulk Mail Facility in Mississauga. She has been employed in various capacities with CPC since January 1982. The incident giving rise to her complaint occurred on April 27, 1991 around 4:00 a.m. She had finished sorting four monotainers of mail from Iran when she claimed she developed an itch. She felt the itch stemmed from a reaction to the Iranian mail, and thus refused to unload

the remaining monotainer containing parcels from Iran.

Kelly Laurence, a CPC supervisor, dealt with Ms. Jolly's refusal to unload the last monotainer of mail from Iran. According to her testimony, on the night in question, Ms. Jolly and five other people were unloading the monotainers. Three individuals were working on one side of the induction belt while three others were working on the other side.

The monotainers are usually parked in lanes pointing towards the induction belt. Workers will usually empty the one closest to them. At approximately 3:15 a.m. Ms. Laurence noticed Ms. Jolly selecting particular monotainers to induct instead of processing the next one in line. She told Ms. Jolly not to do this, as it was causing congestion. At this time, she also requested that all employees working on the line keep the belt full at all times. She returned once more to the line to repeat her instructions. She again observed that Ms. Jolly appeared to be avoiding a monotainer of foreign mail.

At approximately 4:20 a.m., after the break, she noticed the full monotainer still in the same place. She asked Ms. Jolly why she had not processed that monotainer. Ms. Jolly replied she was not going to do it because that type of mail made her itchy. She observed that Ms. Jolly had already unloaded four monotainers with the same type of parcels. Asked if she had any proof that type of mail caused her itch, Ms. Jolly just replied that she was not going to do it. Ms. Laurence did not notice any open or leaky parcels. Nor to her knowledge did Ms. Jolly attempt to unload or even touch the parcels in the fifth and last monotainer of Iranian mail. The other

employees did not complain about the Iranian mail.

Ms. Laurence then ordered Ms. Jolly to unload the monotainer of Iranian parcels. Still Ms. Jolly refused to do it; she was then informed that she was being suspended for the remainder of the shift for refusing a direct order.

Ms. Jolly was asked to come to the office where she was given a suspension and told to leave the building. At this stage she started saying that she was going to report the incident to the Labour Board. At no time, according to Ms. Laurence, did she say she was refusing to work under the provisions of the Code or the collective agreement. Ms. Jolly never requested to see a doctor or go to the hospital. She had never told her supervisor of her allergies or any previous health problems she had when handling the mail.

Ms. Jolly told the Board she has had allergies and sensitive skin since 1979. In particular, she suffers around plants, soil dust, cigarette smoke, fuzz, wool, perfume, seasonings, and some fruits. She takes no shots for the allergies, but does take medication when she has a reaction. She also uses a non-prescription cream if a rash develops. She had previously developed a rash which she felt was work-related.

She does have a pair of gloves to use at work, although she does not really need them to handle parcels. She cannot use the gloves when the itching develops, as she cannot get her hands in them, due to the irritation.

On the night in question, she unloaded four or five monotainers of Iranian mail in sequence when she noticed

her hands started itching. She feared she had touched something she was allergic to. She felt it was the Iranian mail, because it was the only mail she had done in the last half hour. According to Ms. Jolly, after telling Ms. Laurence about the itching, she was told not to touch the mail so as not to get sick. Ms. Jolly then proceeded to unload a monotainer of local mail, leaving aside the last monotainer of Iranian mail. This discussion she claims occurred prior to the break.

After the break, Ms. Jolly continued sorting from the local monotainer. Ms. Laurence returned to the work area and told her to do the Iranian monotainer. The supervisor began yelling at her to unload the monotainer. When she reminded Ms. Laurence of the conversation she had with her before the break,

Ms. Laurence replied that that was then, and this is now. Even when another employee said she would unload it, Ms. Laurence insisted that Ms. Jolly do the job. Shortly thereafter, Ms. Jolly was informed that she was suspended. She left the premises and went home and took her allergy medication. The itching then stopped.

The relevant section of the Code reads as follows:

"147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

(i) has testified or is about to testify in any proceeding taken or inquiry held under this Part,

(ii) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the safety or health of that employee or any of his fellow employees, or

(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part."

An employee who invokes the right to refuse under section 128(1) of the Code is bound under section 128(6) of the Code to report forthwith the "circumstances" of the matter.

"128.(6) Where an employee refuses to use or operate a machine or thing or to work in a place pursuant to subsection (1), or is prevented from acting in accordance with that subsection pursuant to subsection (4), the employee shall forthwith report the circumstances of the matter to his employer and to

(a) a member of the safety and health committee, if any, established for the work place affected; or

(b) the safety and health representative, if any, appointed for the work place affected."

Then, section 128(7) obliges the employer to investigate the matter.

"128.(7) An employer shall forthwith on receipt of a report under subsection (6) investigate the report in the presence of the employee who made the report and in the presence of

(a) at least one member of the safety and health committee, if any, to which the report was made under subsection (6) who does not exercise managerial functions;

(b) the safety and health representative, if any; or

(c) where no safety and health committee or safety and health representative has been established or appointed for the work place

affected, at least one person selected by the employee."

The provisions of the Code that govern the filing of complaints with the Board, alleging illegal employer action against an employee who has invoked the right to refuse provisions of sections 128 and 129, are sections 133(1), (2) and (3).

"133.(1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

(2) A complaint made pursuant to subsection (1) shall be made to the Board not later than ninety days from the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.

(3) An employee may not make a complaint under this section if the employee has failed to comply with subsection 128(6) or 129(1) in relation to the matter that is the subject matter of the complaint."

Danger is defined in section 122(1) of the Code as follows:

"'danger' means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected."

According to CPC, the discipline given to Ms. Jolly actually resulted from her refusal to follow a direct and legitimate supervisory order. Then, when Ms. Jolly realized she was going to be suspended, she used the "right to refuse" as an excuse to cloak her work

performance and previous difficulties with her supervisor. She knew that pursuant to a revised schedule of discipline in effect, her discipline would constitute the ultimate disciplinary action prior to discharge.

CPC argues that the complainant did not have reasonable cause to believe that the existing condition constituted a danger to her. It relies on a recent decision, David R. Holloway (1990), as yet unreported CLRB decision no. 835, where the Board discusses motivation of complainants:

"This Board has said that it is not unreasonable to be wrong where safety and health is concerned and that employees ought not to be discouraged from raising suspicions or fears about danger in the workplace by the imposition of a stringent burden upon them to show at a later date that their refusal was reasonable. Provided that such refusals are motivated by genuine safety concerns the Board has said that it will ensure that employees receive the full protection offered by Part II of the Code. See William Gallivan (1981), 45 di 180; [1982] 1 Can LRBR 241 (CLRB no. 332); David Pratt (1988), 73 di 218; 1 CLRBR (2d) 310 (CLRB no. 686); Roland D. Sabourin (1987), 69 di 61 (CLRB no. 618); and John Charters et al. (1989), 3 CLRBR (2d) 253 (CLRB no. 727).

In William Gallivan, supra, the Board said that where refusals coincide with other labour relations disputes particular attention would be paid to the circumstances to ensure that the refusals were properly motivated by genuine safety concerns. The Board is of the view that the right to refuse under Part II of the Code should not be abused, nor should this right be used to bring longstanding disputes to a head."

(pages 3-4; emphasis added)

CPC relies not only on the law to submit that the

complaint should be dismissed, but also on Ms. Jolly's demeanour and actions. The Board is asked to take a look at the documentation Ms. Jolly filed before the hearing. Also, a great deal of Ms. Jolly's evidence conflicted with Ms. Laurence's.

The Board was not impressed with Ms. Jolly's attitude when she testified. She was defensive, evasive, and at times sarcastic when answering questions from CPC's counsel. There is no doubt she dislikes management and feels it is out to get her especially since she has been made a shop steward.

As to the documentation she filed before the hearing, a great deal of it is irrelevant. She raises several other issues, much of which shows that she deeply dislikes and mistrusts the employer. Although the Board in no way condones her attitude, one must remember that she filed the complaint without the assistance of counsel, and thus would be prone to submitting with the Board irrelevant and ill-considered material.

It is true that the panel heard evidence from witnesses from both sides which was contradictory to each other. Given our conclusions in this case, it is unnecessary to make any determination regarding credibility, because on either parties' evidence, the Board's conclusion would remain the same.

The Board must ask itself if Ms. Jolly's refusal was motivated by genuine safety concerns. First of all, it is clear to the Board that she did make a refusal as contemplated by section 128(1) of the Code.

In the Narrative of Interview as conducted on May 2,

1991, Ms. Laurence confirmed to the panel that the following statement is correct.

"When you (Ms. Jolly) indicated that you considered it unsafe to offload this particular mono of mail. I carefully inspected the mono and observed that the mail was from overseas, no packages were broken in fact you had not even taken one package from this mono. I determined that there was in fact no danger to you in unloading this mono and I ordered you to do so.

Ms. Jolly, I believe you used the 'unsafe' as a reason to avoid having to work on the oversize sorter.

Ms. Jolly, I never had a conversation with you prior to your break where I agreed that you were having some kind of reaction to the type of mail you were working.

I cannot understand you having already worked 5 monos of international mail and when you got to the last mono deciding it unsafe to offload. It was not until you were told I was not satisfied with your efforts, was any mention made as to a problem (a safety problem) with the mail."

(emphasis added)

It is thus clear that Ms. Laurence was well aware that Ms. Jolly was refusing to empty the last monotainer because she perceived it to be unsafe.

Did she refuse to unload it then, as Ms. Laurence suggests, because Ms. Jolly had been told that her efforts were not satisfactory? We do not believe so. According to Ms. Laurence's evidence, she made her remarks about keeping the induction belt loaded to all the workers and not to anyone specifically. Ms. Jolly was aware that her record contained disciplinary notices, and that any further discipline would put her one step closer to being dismissed. It is thus quite inconceivable that she would risk further discipline unless she believed there was danger to her health.

Also, Ms. Jolly continued to unload monotainers. She left aside the one she felt was unsafe but continued her work. It is improbable that Ms. Jolly would have unloaded four monotainers of Iranian mail, not do the fifth one, but continue on working on other parcels, if for any reason other than she thought that unloading that monotainer was dangerous. As Ms. Laurence indicated, the monotainer with Iranian parcels was causing congestion, so it must have also been inconvenient for Ms. Jolly also in the area she was working.

As to Ms. Laurence's decision that the monotainer was in fact safe to unload, the Board in Stan Butler (1991), as yet unreported CLRB decision no. 899, had the following to say on the employer's role:

"It is not the employer who makes the final decision about the existence of non-existence of danger. Section 128(8) allows an employee, who continues to believe that danger exists, to continue to refuse to 'use or operate the machine or thing or to work in that place.' Only a 'safety officer', within the meaning of the Code, is then empowered to decide whether or not there is danger. Sections 129(1) and (2) provide as follows:

'129. (1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the employer and the employee shall each forthwith notify a safety officer, and the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee or the employee's representative.

(2) A safety officer shall, on completion of an investigation made pursuant to subsection (1), decide whether or not

(a) the use or operation of the machine or thing in respect of which the investigation was made constitutes a danger to any employee, or

(b) a condition exists in the place in respect of which the investigation was made that constitutes a danger to the employee referred to in subsection (1),

and he shall forthwith notify the employer and the employee of his decision.'

Under section 130, the Board is mandated to confirm or not confirm a safety officer's decision and in the latter case to issue appropriate directions to correct the situation, but only where a safety officer decides that 'danger' does not exist. If a safety officer agrees that there is danger, an appeal lies to a 'regional safety officer,' not to the Board."

(pages 10-11)

It was impossible for Ms. Jolly to attempt to contact the safety and health committee or a safety officer as she was given a direct order and, having refused it, was suspended almost immediately. Shortly thereafter, another employee unloaded the monotainer. The parcels were then sent along the induction line and thus a safety and health committee representative or safety officer would have had nothing to investigate. The employer also made no effort to call in a safety officer, as is contemplated by section 129(1) of the Code.

The Board concludes that by disciplining Bermiline Jolly, CPC took action against her in contravention of section 147(a) of the Code because she had acted in accordance with section 128.

Under the remedial powers of section 134, the Board

orders CPC forthwith to

- (1) remove from Bermiline Jolly's record the report of the disciplinary interview and eliminate any information from her file regarding this matter which may affect her future employment;
- (2) rescind any disciplinary action taken against Bermiline Jolly; and
- (3) compensate Bermiline Jolly for all lost wages and benefits she may have suffered as a result of CPC's unlawful conduct, including any loss of time or benefits she may have incurred while attending hearings before the Board.

The Board appoints Peter Suchanek, Regional Director for Ontario, or such person he may designate, to assist the parties in implementing the foregoing remedies. The Board will remain seized of the matter in order to deal with any questions that may arise or to issue a formal order if necessary.

Calvin B. Davis
Calvin B. Davis
Member of the Board

DATED at Ottawa, this 20th day of December 1991.

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Summary

GENERAL TEAMSTERS LOCAL UNION NO. 362, APPLICANT, AND ECONOMY CARRIERS LIMITED, WELLS CARGO OILFIELD SERVICES, ALBERTA ROAD MANAGEMENT LTD., ENVIRONMENTAL WASTE MANAGEMENT LTD., HAZMAT TRANSPORTATION SERVICES LTD., A-1 SEWAGE SERVICES (WESTERN) LTD., AND PRIORITY PERSONNEL INC., EMPLOYERS/RESPONDENTS.

Board Files: 555-3321
560-271

Decision No.: 910

These reasons deal with the constitutional jurisdiction of the Canada Labour Relations Board over certain businesses that are part of the ECL Group of Companies which operate in and out of Alberta.

These jurisdiction issues arise in an application for certification wherein the union seeks to represent drivers employed by the ECL Group of Companies. When the said companies responded to the application, only one, Priority Personnel Inc., admitted to employing drivers. All of the companies, including Priority Personnel Inc., raised the question of the Board's authority to regulate their labour relations.

Once the replies were in and the union was aware of the situation, it filed an application under section 35 of the Code for a declaration that some or all of the entities in the ECL Group of Companies constitute a single employer for the purposes of Part I of the Code.

The Board found that it does have jurisdiction over Economy Carriers Limited as an extra-provincial and international transportation operation. The Board also found that Priority Personnel Inc. is an integral and indivisible part of Economy Carriers Limited's operation and that Economy Carriers Limited is the true



Résumé de Décision

LA SECTION LOCALE 362 DU SYNDICAT DES TEAMSTERS (GENERAL TEAMSTERS), REQUÉRANTE, AINSI QUE ECONOMY CARRIERS LIMITED, WELLS CARGO OILFIELD SERVICES, ALBERTA ROAD MANAGEMENT LTD., ENVIRONMENTAL WASTE MANAGEMENT LTD., HAZMAT TRANSPORTATION SERVICES LTD., A-1 SEWAGE SERVICES (WESTERN) LTD., ET PRIORITY PERSONNEL INC., EMPLOYEURS/INTIMÉS

Dossiers du Conseil: 555-3321
560-271

Décision n° 910

Les présents motifs traitent de la compétence constitutionnelle du Conseil canadien des relations du travail à l'égard de certaines entreprises qui font partie de ECL Group of Companies (le groupe ECL), qui est exploitée à partir de l'Alberta.

Les questions de compétence découlent d'une demande d'accréditation dans laquelle le syndicat tente de représenter les chauffeurs travaillant pour le groupe ECL. Dans leur réponse à la demande, seulement une des entreprises, Priority Personnel Inc., a admis embaucher des chauffeurs. Toutes les entreprises, y compris Priority Personnel Inc., ont soulevé la question de la compétence du Conseil pour réglementer leurs relations du travail.

Une fois que les réponses ont été reçues et que le syndicat a été mis au courant de la situation, celui-ci a présenté une demande en vertu de l'article 35 du Code en vue d'obtenir une déclaration selon laquelle une partie ou la totalité des entreprises du groupe ECL constituent un employeur unique, aux fins d'application de la Partie I du Code.

Le Conseil juge qu'il a compétence à l'égard de Economy Carriers Limited parce que celle-ci exploite une entreprise de transport extraprovinciale et internationale. En outre, le Conseil juge que Priority Personnel Inc. est une partie fondamentale et indissociable de l'exploitation de Economy Carriers

employer of the drivers affected by the application for certification. In the circumstances the Board decided not to proceed with the application under section 35 of the Code.

Limited et que cette dernière est l'employeur véritable des chauffeurs visés par la demande d'accréditation. Dans les circonstances, le Conseil décide de ne pas statuer sur la demande fondée sur l'article 35 du Code.

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Reasons for decision

General Teamsters Local Union
No. 362,

applicant,

and

Economy Carriers Limited,

Wells Cargo Oilfield Services,

Alberta Road Management Ltd.,

Environmental Waste Management
Ltd.,

Hazmat Transportation Services
Ltd.,

A-1 Sewage Services (Western)
Ltd.,

and

Priority Personnel Inc.,

employers/respondents.

Board Files: 555-3321
560-271

The Board was composed of Messrs. Hugh R. Jamieson and J. Philippe Morneault, Vice-Chairs, and Mr. Calvin B. Davis, Member.

Appearances:

Mr. Murray D. McGown, for the applicant; and

Mr. Murray Dubinsky, Q.C., for the employers/respondents.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

On June 10, 1991 the General Teamsters Local Union 362 (the Teamsters or the union) filed an application for

certification affecting drivers purportedly employed by what the union referred to as the ECL Group of Companies, which includes the various companies named in the style of cause. Subsequent investigation by the Board's staff and replies filed on behalf of the companies revealed the existence of a complex corporate interrelationship encompassing these companies as well as several others of which only one, Priority Personnel Inc. (P.P.I.), admitted to employing drivers. The replies also raised questions about the Board's constitutional jurisdiction to regulate the labour relations of the affected companies.

On September 10, 1991, the Teamsters filed an application under section 35 of the Code seeking a declaration that some or all of the companies named in the application for certification are a single employer for the purposes of Part I of the Code.

The Board heard the parties on the constitutional jurisdiction issues and the section 35 application at Calgary on November 18 and 19, 1991.

II

Before dealing with the constitutional facts it should be kept in mind that the Teamsters are seeking to represent drivers in the trucking industry. For such drivers to fall within the jurisdiction of this Board they would have to be employed upon or in connection with a federal work, undertaking or business as contemplated by section 4 of the Code.

"4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers."

To be considered as a federal work, undertaking or business under section 4 of the Code, the transportation businesses affected by the instant applications would have to fall within the heading in section 92(10)(a) of the Constitution Act, 1867:

"92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,

...

10. Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam and other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province; ..."

(emphasis added)

The overriding consideration when determining if a transportation operation connects provinces or extends beyond the limits of a province is whether the extra-provincial aspect of the business is regular and continuous. Occasional or irregular extra-provincial activities do not transform a provincial undertaking into a federal undertaking. The leading cases in this regard are Attorney-General for Ontario et al. v. Winner et al., [1954] 4 D.L.R. 657; and [1954] A.C. 541 (P.C.); Regina v. Cooksville Magistrate's Court, Ex Parte Liquid Cargo Lines Ltd., [1965] 1 O.R. 84 (H.C.J.); Regina v. Toronto Magistrates, Ex Parte Tank Truck Transport Ltd.,

[1960] O.R. 497 (H.C.J.); and Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 et al. (1983), 44 O.R. (2d) 560; and 84 CLLC 14,006 (C.A.).

The starting point for the determination of constitutional jurisdiction over labour relations is that provincial competence is the rule. There are exceptions of course and, when assessing whether an exception is called for, one must look to the normal and habitual character of the business in question. Casual or exceptional factors are not to be determinative.

"(1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.

(2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.

...

(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operations.

(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of 'a going concern', without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity."

(Northern Telecom Limited. v. Communications Workers of Canada [1980] 1 S.C.R. 115; (1979), 98 D.L.R. (3d) 1; and 79 CLLC 14,211; pages 132 and 143; emphasis added)

III

Within the preceding constitutional scenario, we can readily discard some of the businesses affected by these

applications as they clearly do not fall within federal jurisdiction. Before we do this, however, it might be useful to describe the corporate relationships with which we are dealing. Briefly, there are two key controlling figures behind the ECL Group of Companies: Messrs. Thomas W. Fredericks and Donald K. Bietz.

Mr. Fredericks, through a holding company, **White Rose Investments Ltd.**, owns 50% of **Economy Carriers Limited (E.C.L.)** which is by far the largest and major corporate entity in the ECL Group of Companies. Mr. Fredericks is the President and General Manager of E.C.L. Through the same holding company Mr. Fredericks also owns 50% of **#347689 Alberta Inc.** which in turn owns 100% of

-Priority Personnel Inc. (P.P.I.),
which we mentioned earlier

-158292 Canada Inc., operating as
Wells Cargo Oilfield Services
(Wells Cargo)

-Environmental Dust Control (Alberta) Ltd.
(this company is non-operational and no further reference will be made to it)

-Alberta Road Management Ltd. (A.R.M.)

-Environmental Waste Management Ltd. (E.W.M.).

E.W.M., in turn, owns 100% of

-Airdrie Vacuum & Sewage Services Ltd.
(this company is non-operational and no further reference will be made to it)

-Hazmat Transportation Services Ltd. (Hazmat)

-A-1 Sewage Services (Western) Ltd. (A-1).

Mr. Bietz, through a holding company, **Pasar Resources Ltd.**, owns the other 50% of E.C.L. of which he is Vice-President and Operations Manager. Through Pasar Resources Ltd., Mr. Bietz also owns the other 50% of

#347689 Alberta Inc. He is the President of this numbered company.

Of the foregoing companies, E.W.M., Hazmat, A-1, and A.R.M. are not in the business of extra-provincial transportation and therefore have no drivers that can be affected by the union's application for certification. E.W.M. is a consulting firm specializing in hazardous waste disposal problems. It presently has six employees who are provided by P.P.I., none of whom are drivers. Hazmat specializes in the transportation of hazardous waste materials primarily within the province of Alberta. We say primarily because it can occasionally become involved in activities outside of Alberta as evidenced by one example that was brought to the Board's attention where Hazmat was involved in a toxic waste round-up at Lloydminster in Saskatchewan. This type of occasional extra-provincial activity does not, however, convert Hazmat into a federal undertaking (Tank Truck Transport Ltd., supra). Hazmat presently has approximately 12 drivers who are provided by P.P.I.

A-1 is in the business of transporting non-hazardous liquid products within the province of Alberta. In fact, its operations are limited to a thirty-mile radius of Calgary. It operates two-vacuum trucks with two drivers who are provided by P.P.I. A.R.M. is a gravel road dust abatement marketing operation. It produces and markets various products used for gravel road stabilization. It operates exclusively in the province of Alberta. A.R.M.'s only connection with truck transportation is that at times E.C.L. provides transportation and equipment on a contract basis for the delivery and application of A.R.M. products.

A.R.M. does not own or operate any trucks on an inter-provincial basis. Clearly, these four companies, E.W.M., Hazmat, A-1, and A.R.M. are provincial undertakings which are beyond the jurisdiction of the Board.

Three other companies can also be eliminated from these proceedings without further ado. White Rose Investments Ltd., Pasar Resources Ltd., and #347689 Alberta Inc., as holding companies without physical assets or employees, they are simply not a consideration for employer status under the Code.

The constitutional facts relating to Wells Cargo do reveal some extra-provincial transportation activities; however, when it is analyzed in light of the normal and habitual activities of this company as a going concern it becomes apparent that any transgressions beyond the boundaries of the province of Alberta are exceptional or casual factors which, in the opinion of the Board, should not be considered as being determinative. There are two sides to Wells Cargo's business. It purchases and markets fluids and other chemicals used in drilling operations and provides related services to oilfields. It also hauls bulk crude for oil companies between oilwells and refineries in northern Alberta. It is this second segment of Wells Cargo operations that entails some sporadic extra-provincial activities. The nerve centre for the transportation of crude oil is at Rycroft, Alberta. From a terminal there, Wells Cargo hauls crude within a radius of about 200 miles. A minuscule portion of these operations spill into northern British Columbia. These extra-provincial

trips are, according to the uncontradicted evidence of Mr. Bietz, on an intermittent, as required basis. Mr. Bietz also said that the extra-provincial trips by Wells Cargo into British Columbia have become even more sporadic lately because of the recent closing of a Petro-Canada oil refinery at Taylor, B.C., which Wells Cargo serviced. Taking all of these factors into consideration and, in the absence of regular and continuous extra-provincial operations on the part of Wells Cargo, we are satisfied that the primary provincial competence over labour relations should prevail in these circumstances. Wells Cargo is, therefore, in our opinion, a provincial undertaking. Perhaps we should mention before moving on to E.C.L. that Wells Cargo does have approximately 16 drivers who are supplied by P.P.I.

IV

As we pointed out earlier, E.C.L. is the major corporation in the ECL Group of Companies. It has been in business since 1947 and it is well known for its specialization in bulk liquid transportation. It prides itself in the role played by E.C.L. in the development of Canada's first articulated double tank units known as petroleum B-Trains and 8-axle L.P.G. B-Trains. E.C.L. operates a fleet of some 130 power units and 160 trailers and tractor sets from its terminals at Calgary and Edmonton. Primary products transported by E.C.L. include refined petroleum products, anhydrous ammonia and liquified petroleum gases such as propane and butane. E.C.L. operates throughout Alberta and extra-provincially into the Yukon, Northwest Territories, British Columbia, Saskatchewan, Manitoba and Ontario.

E.C.L. also transports liquid petroleum gas products internationally to Montana, Idaho and Washington.

As far as the regularity and continuity of E.C.L.'s activities outside the province of Alberta, the Board was told that on any given day there could be 10 to 12 E.C.L. units operating outside the province. Also, there was documentary and oral evidence presented relating to total kilometers run inside and outside the province which were calculated for fuel tax purposes, kilometers travelled extra-provincially relative to drivers wages earned outside the province, and a breakdown of gross income revenue of E.C.L. compared with gross income revenue generating solely from Alberta. Without going into specific details, an analysis of all of these factors clearly substantiate the regular and continuous nature of E.C.L.'s transportation operations beyond the Alberta borders. We are satisfied that not only does E.C.L. hold itself out as an extra-provincial and international carrier, it operates as one. In the circumstances, we have little hesitation in finding that E.C.L. is a work or an undertaking that extends beyond the limits of the province of Alberta as contemplated by section 92(10)(a) of the Constitution Act, 1867. E.C.L. is therefore a federal work, undertaking or business within the meaning of section 4 of the Code.

The next question that arises is whether E.C.L. has employee drivers who can be affected by the Teamsters' application for certification. This brings us to P.P.I. and its role within the ECL Group of Companies.

According to E.C.L., its 140 or so drivers are really employees of P.P.I.

To put this in its proper perspective we have to go back to the fall of 1988 when E.C.L. was a self-contained operation. It had its own internal support systems such as human resources, finance, payroll, accounting, clerical, computer and other such administrative services that normally go to make up a complete operational undertaking. E.C.L. also hired its own managers, supervisors, drivers, dispatchers, mechanics and other employees who are necessary to operate a major transportation undertaking. In the fall of 1988 all of these administrative support services were spun off under the corporate name of P.P.I.

According to Mr. Jack Part, who is now the President of P.P.I. and who used to be the comptroller of E.C.L., this all came about on his recommendation when companies such as E.W.M., Hazmat, A-1 and Wells Cargo, which had been acquired or created by E.C.L., began operations in 1988. This expansion was part of a diversification program that had been instigated by Messrs. Fredericks and Bietz after they had taken control of E.C.L. in 1984. Administrative problems apparently arose when these other companies became operational, particularly in the personnel field. It required a lot of paperwork to move people from one company to another. The creation of P.P.I. eased these hiring and transfer problems and the concept of a central administration services company kept expenses to a minimum for the new companies as they tried to find their niche in the marketplace.

P.P.I. began operations in January 1991, and it was described to the Board as a service company that is considered to be a stand-alone profit center. Its revenues come from service charges levied against the other members of the corporate family for services provided. One example of these charges that Mr. Part explained is a payroll fee. Apparently this fee is charged to each company each time payroll cheques are issued. Other administrative services supplied by P.P.I. include telephone answering, mail handling, computer services, licensing of vehicles and equipment, insurance, fuel taxes, extra-provincial authorities, public relations and marketing, rate setting and human resources. In the human resources field, P.P.I. seeks out and screens prospective employees who have the necessary skills and experience to fill any particular vacancy within the ECL Group of Companies. The operational company having the vacancy then makes the final selection.

P.P.I. claims to have some 280 employees ranging from management and supervisory types, sales persons, office and clerical people, dispatchers, mechanics, drivers, and driver trainers. The bulk of these people work directly or indirectly for E.C.L. For example, of the 170 or so drivers on P.P.I.'s payroll, 140 work for E.C.L.

What we have to determine, in the context of constitutional law, which is primarily what we are dealing with here, is whether P.P.I. is really a new and separate undertaking with an independent purpose, or is it merely the continuation of E.C.L.'s administrative service systems dressed in a different corporate cloak.

In making this determination we must look to the reality of the situation and not be swayed by corporate appearances. The Supreme Court of Canada made this perfectly clear in Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission), [1989] 2 S.C.R. 225:

"Underlying many of the arguments is an unjustified assumption that by choosing a particular corporate form the various players can control the determination of the constitutional issue. This Court has made it clear in this area of constitutional law that the reality of the situation is determinative, not the commercial costume worn by the entities involved. ..."

(page 263; emphasis added)

The Supreme Court also emphasized that the focus is on the nature or character of the undertaking in question:

"There is ample authority for the proposition that the crucial issue in any particular case is the nature or character of the undertaking that is in fact being carried on. ..."

(Alberta Government Telephones, supra, pages 257-258)

The reality of the situation here is that little has changed since P.P.I. was spun off from E.C.L. P.P.I. is still no more than an integrated division or a department of E.C.L. It has no individual character or purpose of its own. P.P.I. is, as it always was, a collection of E.C.L.'s major internal organs. The functions P.P.I. performs and the services it provides makes it an integral and indivisible part of E.C.L.'s overall transportation undertaking. In the given circumstances, P.P.I. is not in our view a separate

undertaking with an independent purpose; its purpose is E.C.L. The fact that a minor or incidental portion of P.P.I.'s operations involve the provision of similar services to other related corporate entities within the same corporate family that happen to fall within provincial jurisdiction is inconsequential. Once the corporate veil is pierced, it becomes clear that it is E.C.L. that is still providing these support services to the rest of the ECL Group of Companies, albeit under a different corporate label.

Looking to the drivers of E.C.L. for instance whom we are particularly interested in because of the scope of the bargaining unit sought to be represented by the Teamsters, these people are a good example of the change in form but not of substance that has resulted from E.C.L. donning the corporate cloak of P.P.I. for administrative service purposes. Although purportedly employed by P.P.I., these drivers still report for work at E.C.L., they wear E.C.L. uniforms and they operate E.C.L. equipment. They are still dispatched by E.C.L., their work is directed and supervised by E.C.L., and the way bills and other paperwork they carry around from day to day is in the name of E.C.L. To the public at large, they are E.C.L. Furthermore, the truth of the matter is that these drivers are still paid by E.C.L. even if their paycheques do carry the name of P.P.I. For the purposes of Part I of the Code, the true employer of these drivers is unquestionably E.C.L.

(For an overview of the Board's approach to this whole question of the true employer which we adopt here, see Northern Television Systems Ltd. (1976), 14 di 136; and 76 CLLC 16,031 (CLRB no. 64); and Nationair (Nolisair

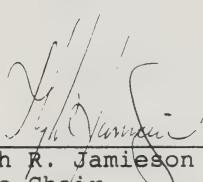
International Inc.) (1987), 70 di 44; and 19 CLRBR (NS) 81 (CLRB no. 630)..)

Let us say immediately that there is nothing sinister about E.C.L. performing its administrative functions under a separate corporate label and there should be no inference drawn here about anti-union motives. There are none. Employers have the right to structure their affairs as they see fit and there are no rules to say that each function of a business cannot be under different corporate names. Our problem here is that a group of employees have indicated a desire to participate in collective bargaining and it is our task to determine who, if anybody, is to sit on the other side of the bargaining table. This is why the Board has developed the criteria set out in Northern Television Systems Ltd., supra, and Nationair (Nolisair International Inc.), supra. It is to identify the real employer to ensure that collective bargaining will be meaningful. As we said, here the true employer is unquestionably E.C.L.

In summary, the Board has found that White Rose Investments Ltd., Pasar Resources Ltd. and #347689 Alberta Inc. are not affected by either of the Teamsters' applications. They are simply holding companies with no physical assets or employees. E.W.M., Hazmat, A-1, A.R.M. and Wells Cargo are provincial undertakings which are beyond the jurisdiction of the Board. They are stand-alone separate undertakings notwithstanding the services they receive from E.C.L. through P.P.I., and they are not vital, essential or integral to the operations of E.C.L. E.C.L. and P.P.I. are a single integrated indivisible undertaking that is

in the business of intra-provincial, extra-provincial and international truck transportation. As such, it falls within the jurisdiction of this Board. The Board also found that for the purposes of Part I of the Code E.C.L. is the true employer of the drivers who are purportedly supplied by P.P.I.

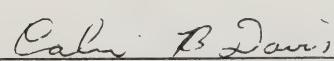
Having so decided, the Board will proceed to deal with the merits of the application for certification through the normal in-camera process. In the circumstances, where we are dealing with a single integrated federal work, undertaking or business, we shall not proceed with the union's application under section 35 of the Code.



Hugh R. Jamieson
Vice-Chair



J. Philippe Morneau
Vice-Chair



Calvin B. Davis
Member

DATED at Ottawa this 16th day of December 1991.

Information

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SUMMARY

**GENERAL TEAMSTERS LOCAL UNION
979, APPLICANT, BRINKS CANADA
LIMITED AND BRINKS SECURITY
LIMITED, RESPONDENTS.**

Board File: 555-3261

Decision No.: 911

The instant case deals with a constitutional matter arising out of an application for certification filed on January 10, 1991 by the General Teamsters Local Union 979 affecting Brinks Canada Limited and Brinks Security Limited. The employer submitted that the Board did not have constitutional jurisdiction to deal with the application to the extent it sought to include the data tape employees.

In Manitoba, the operations of the employer are carried out under a dual corporate structure: Brinks Canada Ltd. and Brinks Security Ltd. which is a wholly owned subsidiary of the former. Brinks Canada Limited is engaged in the transportation and storage of monies and securities, together with the maintenance and servicing of automatic teller machines which are operated by various financial institutions. Brinks Security Ltd. provides for the storage, delivery and pick up of various forms of confidential computer data.

In order to determine whether it has jurisdiction, the Board asked itself a two-fold question:

- Do the data tape activities of Brinks Security Ltd. constitute a distinct severable undertaking; and if so
- Does this undertaking form an integral part of, or is it vital to Brinks Canada Ltd.'s business.

The Board answers the first question in the affirmative having determined on the basis of the evidence before it that the business objectives, methods, equipment and clientele of Brinks Security are clearly different from those of the parent company. As regards the second question, it is the Board's conclusion that the data tape activities of Brinks Security Ltd. are not integral to any federal work or undertaking, and that the work of those employees is not engaged upon or in connection with a federal work or undertaking. It follows that the Board lacks jurisdiction to deal with the segment of the application that pertains to those employees.

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RÉSUMÉ

**LA FRATERNITÉ INTERNATIONALE
DES TEAMSTERS, SECTION LOCALE
979, REQUÉRANT, BRINKS CANADA
LIMITÉE ET BRINKS SECURITY
LIMITED, EMPLOYEURS INTIMÉS.**

Dossier du Conseil: 555-3261

N° de Décision: 911

Il s'agit dans la présente affaire d'une question constitutionnelle découlant d'une demande d'accréditation déposée le 10 janvier 1991 par la Fraternité internationale des Teamsters, section locale 979 et touchant les employés de Brinks Canada Ltée et Brinks Security Ltd.. L'employeur soutient que la demande n'est pas de la compétence constitutionnelle du Conseil dans la mesure où elle vise les employés affectés à la garde de documents électroniques.

Les activités de l'employeur au Manitoba sont reliées à une double structure de compagnie: Brinks Canada Ltée et Brinks Security Ltd., cette dernière étant une filiale à part entière de la première. Brinks Canada Ltée s'occupe du transport et de la garde de monnaies et de titres en plus du service et de l'entretien des guichets automatiques exploités par diverses institutions financières. Brinks Security Ltd. voit à la garde, à la cueillette et à la livraison de données électroniques confidentielles.

Dans l'examen de sa compétence constitutionnelle, le Conseil a soulevé deux questions:

- les activités liées aux documents électroniques constituent-elles une opération distincte et dissociable et, si oui
- cette entreprise fait-elle partie intégrante de Brinks Canada Ltée ou est-elle indispensable à l'exploitation de cette dernière?

Le Conseil répond par l'affirmative à la première question puisque la preuve fait état d'objectifs d'entreprise, de méthodes, d'équipement et de marchés distincts qui la démarquent clairement des activités de la société principale. Pour ce qui est de la deuxième question, le Conseil estime que ces activités ne font pas partie intégrante de l'entreprise fédérale principale et que la tâche des employés visés n'y est pas rattachée. Il s'ensuit que le Conseil n'a pas compétence pour traiter de la demande qui vise ces mêmes employés.

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Reasons for decision

General Teamsters Local Union 979,

applicant,

and

Brinks Canada Limited and Brinks Security Limited,

respondents.

Board File: 555-3261

The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair and Mr. François Bastien and Ms. Mary Rozenberg, Members.

Appearances:

Messrs. David L. Lewis and Al McGregor, assisted by Messrs. Ashdown and Wilgosh, Business Agents, for the applicant; and

Mr. George Vassos, assisted by Mr. Stuart McNabb, Branch Manager and Regional General Manager, Prairie Central and Mr. Gérard Riendeau, for the employer.

These reasons for decision were written by Mr. François Bastien, Member of the Board.

I

The instant case deals with a constitutional matter arising out of an application for certification filed on January 10, 1991 by the General Teamsters Local Union 979 affecting Brinks Canada Limited and Brinks Security Limited. In its application, the union described the proposed bargaining unit as follows:

"all employees of Brinks Canada Limited in the Province of Manitoba employed in the operation of automatic teller machines and

- data tape services, excluding those excluded by Part 5 of the Canada Labour Code." [sic]

In its reply dated January 28, 1990 counsel for the employer submitted that the Board did not have constitutional jurisdiction to deal with the application to the extent it sought to include the data tape employees. The Board held a hearing in this matter on June 4, 1991 in Winnipeg. At the outset, parties were informed that the Board would confine itself to the constitutional issue raised by the employer, and that all other matters relating to the definition of the appropriate bargaining unit would be dealt with in camera, in accordance with the Board's usual practices. Further, the Board reminded the parties that its previous decision pertaining to the federal character of the undertaking was made on account of the interprovincial nature of Brinks' transportation operations in Manitoba. The issue before the Board was therefore whether the employees engaged in the data tape activities of Brinks Security Ltd. were employed on, or in connection with the operation of that federal work or undertaking.

In the meantime, the Board received another certification application from the Amalgamated Transit Union (ATU) for a unit covering employees of Brinks Canada Limited in Calgary, Alberta (Board file: 555-3308). In its hearing notice of August 8, 1991 to the parties involved in this latter case, the Board stated that it would hear the issue of its jurisdiction over the Calgary operations of Brinks Canada Limited. It added the following:

"The Board is hopeful that it can make a determination which will clear up this jurisdiction issue once and for all and avoid further confusion which has arisen because of the hodge-podge of provincial and federal certification orders affecting Brinks which

- have resulted from the branch-to-branch approach taken in the past. To this end the Board is desirous to receive evidence relating to whether Brinks is an indivisible national or international transportation undertaking and also where the Calgary operations fit into the scheme of the undertaking.

As the Board's final determination could affect the bargaining rights of the Teamsters, they are hereby notified of the Calgary hearing and invited to participate if they so desire."

Subsequent to the hearing held in Calgary on September 25 and 26, an interim certification order was issued on November 1, 1991 which confirmed in effect the Board's jurisdiction over the Calgary operations of Brinks Canada Limited.

On the same day it issued the hearing notice in the Calgary file, the Board advised the parties in the present case that it had decided to issue an interim review order granting the applicant, General Teamsters Local Union 979, bargaining rights for the automatic teller machine technicians employed by Brinks Canada Limited in the Province of Manitoba. It further stated that the issue of whether this Board had jurisdiction over employees of Brinks Security Limited engaged in data tape services would be held in abeyance until the Board made its determination regarding Brinks as a federal undertaking or entity.

This is the context in which the present determination of the constitutional jurisdiction of the Board is set. These reasons deal strictly with whether the Board has constitutional jurisdiction over Brinks Security Limited's employees currently engaged in the provision of data tape services out of its Winnipeg office.

II

In its Winnipeg operations, the employer is identified under a dual corporate structure: Brinks Canada Ltd. and Brinks Security Limited. The two companies are separately registered. Brinks Canada Limited is a Canadian subsidiary of an international company engaged in the transportation and storage of monies and securities. It is also engaged in the maintenance and servicing of automatic teller machines which are operated by various financial institutions.

Brinks Security Limited is a wholly owned subsidiary of Brinks Canada Limited. Brinks Security Limited provides for the storage, delivery and pick up of various forms of confidential computer data.

The activities of Brinks Canada Limited and Brinks Security Limited fall under the following functional areas:

- a) Armoured Transportation and Currency Division. Based on York St., this component constitutes the core of the employer's business. It is responsible for the highly secure transportation of a host of valuables including currency, negotiable items, gold, etc. It operates a fleet of some 14 trucks, 13 of which are based at the York St. location; some are interprovincially licensed; the servicing and maintenance of the fleet is contracted out. These vehicles are used by a team of 2 or 3 persons, carrying firearms, a team of 2 being the required minimum. Its services, in addition to transportation, include treasury consolidation and money deposit count functions, and are currently

provided to some 500 customers, mostly in the financial sector. Currency and valuables are stored in the three vaults available at the York St. location for periods that typically do not exceed 24 to 48 hours, as currency is moved in and out daily, and coins are regularly replenished. No long term or "dead" storage is available at that location.

- b) Coin processing. This function located on Dawson Rd., involved the handling, rolling and boxing of coins, as well as pick up and delivery services to financial institutions and the Royal Canadian Mint. Indeed, this role of Brinks makes it an extension of the latter. The location itself is thought of as a vault as the entire premises are securely guarded. Employees who work at that location are coin processors, rollers and supervisors. Vehicles operating at this facility are armoured tractors and trailers. There is no operational interaction between coin and data tape employees.
- c) Automated teller machine (ATM) and data tape. Both services are housed at the King Edward St. facility; since 1983, this location serves as well as the Brinks' Regional Office. The data tape service occupies a 2000 square-foot area featuring a temperature and humidity controlled concrete vault and fire protection systems. Except for management, access to the data tape alarmed premises is restricted to its two full-time and two part-time employees. Employees from the ATM section have exterior access to the building and do not perform business functions at that location. Employees from both areas share locker room facilities.

From this overview of the entire operations of the employer in the Province of Manitoba, let us now turn our attention to a more detailed examination of the data tape activities and where they fit within the Brinks business environment.

The data tape business grew out of a decision by Brinks' local management in the mid seventies to identify compatible business opportunities to offset the difficulties experienced in the highly competitive automatic teller machine sector. The growth potential of the data industry was a clear factor in the decision. Two employees originally hired to perform ATM duties were thus reassigned to the data tape side of the business, one on a full-time basis. Brinks experienced significant growth in this area starting in the early eighties which led to the creation of an additional full-time position last year. The data tape function currently employs two full-time and two part-time employees.

In his testimony, the general manager of the Manitoba Branch, Mr. Stuart McNabb, described the data tape business as that of storing and distributing data tapes, microfiches and other electronic support for some 35 customers all located within a 10-mile radius of the Winnipeg downtown area. These customers are from large and small firms and are primarily financial institutions, airline, aerospace, transportation, telecommunication and payroll companies, and to a lesser extent, government. Their business is solicited by sale staff and not tendered, as is the case with ATM.

Access to the data tape area at the King Edward St. location is tightly controlled and limited, as indicated above, to the data tape employees and management. Pass

cards and keys are required. Sales staff based at that location have access through the exterior doors only.

There are two (2) vehicles assigned to the data tape operations plus one back-up van. These two vehicles are provincially-licensed, panelled vans identified as Brinks Security Limited. They harbour Brinks' Security corporate colours, i.e. brown and dark yellow as opposed to Brinks Canada's armoured division's dark and light blue. They are radio-equipped with pagers hooked into a central answering service. This set up is meant to ensure continuing service to subscribing customers. Employees assigned to data tape operations normally wear a brown uniform. Goods transported do not include negotiable items or cash as these are not kept on the King Edward St. premises. This location, unlike the others, allows for "dead" or long term storage, the category within which fall the data tapes and microfiches it contains. These tapes are retrieved, used by the customers and then sent back to be stored again.

Data tape employees like the ATM technicians and coin centre employees report to the general manager of the Manitoba branch through an Assistant Branch Manager, Mr. Cough. The organizational change is most recent and "the diagram's ink not dry yet," as Mr. McNabb indicated. Work schedules for data tape employees are prepared by the data storage lead hand, Robert Laurie; ATM employees have theirs prepared by their supervisor, P.W. Klassen. The two part-time employees perform most of their work on the ATM side and work relief only in data storage. Data tape training takes between one and two months.

Administratively, the data tape employees are not treated differently from their colleagues of other areas. They

are paid with cheques from Brinks Canada Ltd., which also issues their income tax slips. However, there are separate accounts kept of data tape revenue and costs with periodic inter-profit centre transfers to reflect business realities. Separate annual reports are also prepared for Brinks Canada and Brinks Security.

III

In his argument, counsel for the employer stated that there is a core federal undertaking to the business of Brinks Canada Ltd. in Manitoba, and that this core relates to its extra provincial transportation activities. This deals only, he argues, with the first question of the three-part test found in Marathon Realty Company Limited, (1977), 25 di 387; [1978] 1 Can LRBR 493; and 78 CLLC 16,138 (CLRB no. 117), an appropriate one for the present case. As regards the second question, namely is the work in question done on or in connection with the operation of the federal work, undertaking or business, it is counsel's contention that it is not.

In his view, there is no direct link between the tape business and the federal undertaking, which in the instant case is interprovincial transportation. Data tape is an extra service offered to a different set of customers and one that does not feed into the primary business. The nature of the work is that of a purely local undertaking in that it operates within a short local radius, and its employees work at a location separate from that of the primary business. He admits to the existence of some links, such as the overseeing of both the ATM and data tape employees by the same Assistant Manager, Mr. Cough, and the provision of intra-

company daily mail service, but submits that these aspects are in themselves inconsequential. The sum total of the evidence is, according to him, that the data tape business is clearly not an integral part of the federal undertaking.

Counsel for the Teamsters submitted that the nature of the relationship between the federal undertaking and the data tape business indicates that the latter is work done on or in connection with that federal part. He points to the shared premises of ATM and data tape employees, the issuing of income tax slips under a single corporate name (Brinks Canada Ltd.), and the occasional intermingling of vehicles and different uniforms to illustrate the level of operational integration between the two sides of the business. What makes good labour relations sense is another factor that, in his opinion, the Board must take into account. In this instance, there would be adverse labour relations effects upon the individuals concerned if they were to be segregated from the core unit.

Citing Canadian Air Line Employees' Association v. Wardair Canada (1975) Ltd. et al. [1979] 2 F.C. 91; 97 D.L.R. (3d) 38; and (1979) 25 N.R. 613, he holds that it suffice that the operation in question be reasonably incidental to the operation of a federal work, undertaking or business for it to fall within the federal jurisdiction. Reviewing the connecting factors such as the same corporate paychecks and income tax slips, the occasional use of ATM trucks as back-up for the data tape operation and occasional wearing of same uniforms, he argues that, taken as a whole, they do amount to what can be considered a necessarily incidental part of the federal nexus.

IV

The constitutional basis of the Board's authority in labour relations is found in Paragraph 2(b) of the Canada Labour Code. It states:

"2. In this act,

'federal work, undertaking or business' means any work, undertaking or business that is within the legislative authority of Parliament, including without restricting the generality of the foregoing,

...

(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,"

Similarly, Paragraph 92(10)a) of the Constitution Act of 1867 delineates the constitutional authority of Provincial Legislatures:

"92. In each Province the Legislature may exclusively make laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, -

...

10. Local Works and Undertakings other than such as are of the following Classes:

a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province: ..."

The Supreme Court of Canada has devised, based on the abundant case law before it, a test for the determination of whether a group of employees falls within federal or provincial jurisdiction. This is known as the Northern Telecom test (Northern Telecom Canada Limited v. Communications Workers of Canada et al. [1980]; 1 S.C.R. 115; (1979) 98 D.L.R. (3d) 1; and 79 CLLC 14,211; and

Northern Telecom Limited v. Communications Workers of Canada, [1983] 1 S.C.R. 733; (1983), 147 D.L.R. (3d) 1; and 83 CLLC 14,048). In the first of these decisions were summarized the guiding principles of the decision of Beetz J. in Construction Montcalm Inc. v. The Minimum Wage Commission [1979]; 1 S.C.R. 754. These principles are set out as follows:

(1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.

(2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.

(3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.

(4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.

(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.

(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of a 'going concern', without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity."

(p. 132)

It is within this broad constitutional framework that the Board has to answer the two-fold question before it:

- a) Do the data tape activities of Brinks Security Ltd. constitute a distinct and severable undertaking; and

if so,

- b) Does this undertaking form an integral part of, or is it vital to Brinks Canada Ltd.'s interprovincial transportation business, which is the core federal undertaking.

v

In accordance with the principles stated above, the Board looked at the normal and habitual activities of the employees of Brinks involved in the data tape operations. In doing so, it asked itself whether these activities were carried on in such a way that they formed a different business entity. Based on the documentary and testimonial evidence before it, it is the Board's conclusion that they do. The reasons are many.

- a) The business aims of the data tape business are to provide customers with secure storage of personal, financial and other protected data and for their easy access and retrieval through a pick up and delivery service. For its part, Brinks Canada Ltd. is in the business of providing safe and secure transportation of coins, currency and other valuables.
- b) The facility requirements of the two businesses are markedly different and attest to the different customer needs served in each case. Brinks Canada's goods are stored in the vault for a period rarely exceeding 48 hours; thus, the vaults are used as short way-stations for goods awaiting further transport to their ultimate destination. Not so with data tapes whose long term storage and preservation objective is attested by the physical characteristics of the King

Edward St. facility which is air and humidity-controlled, and an alarmed room covered with fire retardant-material.

- c) Customers on the currency side are serviced on a scheduled-run basis while services provided to data tape customers are essentially offered "as needed". The primary service sought of Brinks Canada Ltd. is that of transportation; of Brinks Security Ltd., it is that of storage.
- d) The technology and equipment used in the two operations differ. The radio and paging set up of the non-armoured vehicles dedicated to the data tape operations denotes clearly the different business environment in which it operates. The customer needs served in this case are of a more random nature, the servicing of which requires a more sophisticated communication system. Similarly, the relatively non-negotiable value of the goods transported in the data tape business probably accounts for the use of paneled vans as opposed to armoured trucks.

All in all, it is quite clear that the Board finds itself in the presence of two distinctly identifiable businesses as described in Chester Pacan, [1984] OLRB Rep. April 649; and Holmes Transportation (Québec) Ltd. v. Transport Drivers, Warehousemen and General Workers, Local 106, [1978] 2 F.C. 520 (C.A.); and Canadian Pacific Railway Company v. Attorney General for British Columbia et al. [1950] A.C. 122 and [1950] 1 D.L.R. 721. One business consists of interprovincial transportation with specific security requirements; the other, of secure long-term storage of electronic data. But there still remains the question of the extent to which these two parts are

related and their constitutional definition, given the actual conditions within which both businesses are operated.

Or put another way, this question involves determining whether the physical and operational connections between the two exist to such a degree that the data tape activities form a vital and integral part of the core federal undertaking. (See Northern Telecom Canada Limited, supra, p. 133) Relative to that question, the Board has determined, based on the facts before it, the following:

- a) The physical connections are limited to the sharing of the facility at the King Edward St. location where both ATM technicians and data tape employees work. But even in that case, the two groups of employees are physically separated, the data tape portion being accessed on a restricted basis by employees having their own cards and keys.
- b) At the operational level, there is little integration as the work schedules of data tape employees are prepared internally, and that ATM trucks are used as back-up only. As well, distinct corporate colours and uniforms are used in the two operations. The data tape unit is treated as a separate revenue and cost centre. The fact that two ATM employees work part-time on tape operations is not significant given the rest of the operational context.
- c) The provision of common business services such as marketing, accounting, personnel and general management is not in itself determinant in constitutional terms. As stated recently by Dickson

C.J. in United Transportation Union v. Central Western Railway Corp., [1990] 3 S.C.R. 1112; (1990), 76 D.L.R. (4th) 1; and 91 CLLC 14,006.

"... This Court's dicta consistently suggests that something more than physical connection and a mutually beneficial commercial relationship with a federal work or undertaking is required for a company to fall under federal jurisdiction."

(pp. 1147, 24, 12,057)

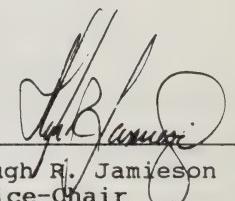
The common services just referred to may be conceived along similar lines whether they are internally or externally dispensed, as the data tape business is in fact given a relative degree of operational autonomy.

- d) That the data tape component of the business of Brinks is not an integral part of the core undertaking can best be seen by the different role assigned to transport in the two operations. Transport is clearly incidental to the main business of Brinks Security which is the secure, long term storage of magnetic tapes. As such, it clearly serves the electronic archival needs of its customers. Inversely, transport is not incidental to but is the main business of Brinks Canada Ltd.. It serves the transport needs of clients with currency, coin and negotiable items business demands.

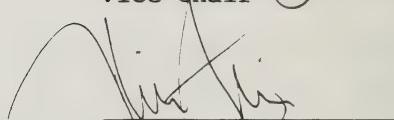
- e) The crucial line of demarcation between the two businesses is not found in the nature of their two specific markets i.e. local and interprovincial but, intrinsically, in the different set of activities they engage in to fulfil their business aims. As stated, Brinks Canada Ltd. is in the interprovincial transportation business, while Brinks Security Ltd.

is in that of long term storage of electronic data. This is a situation different from the one referred to in Attorney-General for Ontario et al. v. Winner et al., [1954] 4 D.L.R. 657; and [1954] A.C. 541 where the issue was the extent of extraprovincial relative to local transportation activity. In the instant case, not only are the services delivered to two geographically distinct markets, but the services themselves are fundamentally different.

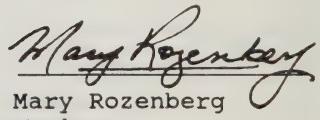
Consequently, it is the Board's unanimous conclusion that the data tape activities of Brinks Security Ltd. are not integral to any federal work or undertaking, and that the work of those employees is not engaged on or in connection with a federal work or undertaking. It follows that the Board lacks jurisdiction to deal with the segment of the application that pertains to those employees.



Hugh R. Jamieson
Vice-Chair



François Bastien
Member



Mary Rozenberg
Member

ISSUED at Ottawa, this 19th day of December, 1991.

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Summary

CRAIG F. BROWN, COMPLAINANT,
AND BROTHERHOOD OF
LOCOMOTIVE ENGINEERS,
RESPONDENT, AND CANADIAN
PACIFIC LIMITED, EMPLOYER.

Board File: 745-3860

Decision No.: 912

These reasons deal with a complaint filed by Mr. Craig Brown that his union, the Brotherhood of Locomotive Engineers represented him in a manner contrary to section 37 of the Canada Labour Code.

Mr. Brown had been terminated by his employer. The union grieved the termination. The General Chairman of the union reached an agreement with the employer whereby Mr. Brown was to be reinstated with time not in service prior to November 1, 1990, regarded as a suspension. He also received 45 demerit points as well as being restricted to yard service.

Mr. Brown was not satisfied with the conditions under which he was to be reinstated. He felt the General Chairman had not properly handled his grievance. In particular he felt he had been discriminated against because other members of the crew had received lesser sanctions.

After considering the evidence, the Board found the union had not acted contrary to the Code. The Board stated that it was not their role to pass judgment on whether or not union representatives are doing a good job or not and dismissed the complaint.

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Résumé de Décision

CRAIG F. BROWN, PLAIGNANT, ET
LA FRATERNITÉ INTERNATIONALE
DES INGÉNIEURS DE LOCOMOTIVES,
INTIMÉE ET CANADIEN PACIFIQUE
LIMITÉE, EMPLOYEUR.

Dossier du Conseil: 745-3860

N° de Décision: 912

Dans cette affaire, le Conseil statue sur une plainte déposée par M. Craig Brown. Celui-ci allègue que son syndicat, la Fraternité internationale des ingénieurs de locomotives, a violé les dispositions de l'article 37 du Code canadien du travail.

M. Brown a été congédié et, à la suite de ce congédiement, le syndicat a présenté un grief. Le président du syndicat et l'employeur en sont arrivés à une entente selon laquelle M. Brown réintégrerait son poste. Cependant, la période antérieure au 1er novembre 1990 serait considérée comme une suspension et M. Brown se verrait attribuer 45 points de démerite. En outre, M. Brown serait affecté exclusivement au triage.

M. Brown était insatisfait de ces conditions et estimait que le président n'avait pas traité le grief de la façon appropriée. Il estimait, plus particulièrement, avoir été la victime de discrimination puisque d'autres membres de l'équipe avaient été moins sévèrement réprimandés.

Après avoir examiné la preuve, le Conseil a déterminé que le syndicat n'avait pas violé les dispositions du Code. Le Conseil a déclaré qu'il ne lui incombaît pas de juger si les représentants syndicaux s'accusaient correctement ou non de leurs fonctions. La plainte a été rejetée.



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REASONS FOR DECISION

Craig F. Brown,

complainant,

and

Brotherhood of Locomotive
Engineers,

respondent,

and

Canadian Pacific Limited,
employer.

Board File: 745-3860

The Board was composed of Mr. Thomas M. Eberlee, Vice-Chair, and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances:

Mr. Craig F. Brown, on his own behalf;

Mr. Phillip Hunt, for the respondent; and

Mr. Richard Smith, for the employer.

These reasons for decision were written by Mr. Calvin B. Davis, Member.

I

This case deals with a complaint filed by Craig F. Brown, alleging that his union, the Brotherhood of Locomotive Engineers (BLE), represented him in a manner contrary to section 37 of the Canada Labour Code (Part I - Industrial Relations).

Section 37 reads as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a

bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The Board heard the matter on November 26, 1991 in Vancouver, B.C.

Mr. Brown, a locomotive engineer for Canadian Pacific Limited (CP Rail), ran a stop signal while on duty, on December 28, 1989. The employer investigated the incident and determined it was serious enough to discharge the complainant and did so in mid-February of 1990.

Mr. Brown filed a grievance with the union, since he felt the discipline he received was far more severe than that received by other crew members. The other members had apparently received demerit points and were reinstated. Also, Mr. Brown adamantly denied the employer's claim that he had attempted to conceal the incident, stating that, in fact, he voluntarily admitted to it a couple of days later.

Mr. Brown feels his grievance was dealt with adequately at step 1 of the grievance procedure. Mr. Longworth, the Local Chairman, processed the grievance. When the grievance was turned down by the employer at step 1, Mr. Longworth then forwarded it on to Mr. Hucker, the General Chairman, to be dealt with at step 2.

It is from this point in the grievance procedure that Mr. Brown became concerned about the manner in which his grievance was being handled. Mr. Brown believed he was being discriminated against: he had been terminated while other crew members (members of another union) had received

lesser sanctions. Mr. Hucker did not consider the termination as discriminatory, but rather as a violation of Rule 292. Also, at step 2, the General Chairman did not pursue the grievance in writing as required by the collective agreement. Thus, Mr. Brown fears that the employer never had a true picture of the situation when Mr. Hucker discussed the matter with it.

Mr. Hucker agrees he never put the grievance in writing at step 2. When the grievance was forwarded to him, he discussed it with the employer with a view to resolve the matter. He took into consideration the transcripts of the investigation hearing of Mr. Brown's violation. Also, the union reviewed several arbitrations similar to Mr. Brown's, which proceeded to arbitration, but was not successful in having the discipline changed or removed by the arbitrator.

On August 27, 1990, Mr. Hucker met with the General Manager of CP Rail and persuaded the employer to rescind the dismissal. The employer agreed to do so on the following basis.

1. Mr. Brown will be restricted to yard service.
2. Mr. Brown's record will stand at 45 demerit points, and the time not in service prior to November 1, 1990 will be regarded as a suspension.

Mr. Hucker felt the employer's proposal was quite similar to that sought by Mr. Longworth at step 1.

"Based on Engineer Brown's personal work record, and due to his discipline record prior to this incident, Division 320 would request that Engineer Brown be reinstated on the following basis.

Time off since December 28, 1989 to be shown

as a suspension. Engineers [sic] Brown's discipline record to stand at 55 Demerit Marks. Restricted to Yard Service as a Locomotive Engineer for a period not exceeding 1 Year."

Getting Mr. Brown reinstated turned out to be no easy task, and forms part of his complaint. In early September, Mr. Hucker contacted the Local Chairman and advised him of the conditions of reinstatement. When he received no objections, he assumed the agreement was acceptable and so informed the employer. Mr. Longworth claims he did not object to the reinstatement, but rather to the other conditions under which Mr. Brown was to be reinstated.

Mr. Hucker advised Mr. Longworth not to let the complainant know of the reinstatement until the General Manager of CP Rail had the opportunity to advise the Vancouver Superintendent of it. On October 19, Mr. Longworth was given the green light. He contacted Mr. Brown's wife on October 19, and informed her that her husband might be reinstated but gave no other details. Over the next few days Mr. Brown had contact with the Local Chairman but still could not get any details of his reinstatement.

Finally, the employer got hold of Mr. Brown in December 1990, and a meeting was set up between the Deputy Superintendent, the Local Chairman, and the complainant, for December 17, 1990. At this meeting, Mr. Brown received a letter dated December 12, 1990, indicating he would be reinstated. It was at this meeting that he first learned of his reinstatement, and its conditions. A couple of months passed before he actually went back to work. This was because he wished to find out if the union intended to pursue his grievance at step 2, and

beyond, if necessary. He also wished to learn from the employer the conditions of his reinstatement, in particular the duration of his assignment to yard service. He returned to work at CP Rail on February 18, 1991.

In Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509; (1984), 9 D.L.R. (4th) 641; and 84 CLLC 14,043, the Supreme Court of Canada established the following criteria which it felt a union should adhere to in handling grievances:

"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
3. The discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

(pages 527; 654; and 12,188; emphasis added)

As can be seen from the above, in particular no. 2, the union enjoys a great deal of discretion when dealing with employee grievances.

As stated previously, Mr. Brown feels that if the grievance had been pursued at step 2 in writing, the results could have been different. This may or may not be the case. However, Mr. Hucker had the right as union representative to handle the grievance in such a manner as to produce the best results. Even though a formal grievance procedure is set out in a collective agreement, it need not be followed to the letter. Grievances are quite often settled in an informal manner, as we have seen here. There is nothing wrong with that behaviour as long as the union does not act in an arbitrary or discriminatory manner or in bad faith.

As bargaining agent, the union has the sole discretion to determine whether or not the grievance proceeds to arbitration. There are various reasons why a union may choose, after considering a grievance, not to go to arbitration. The union will most importantly weigh the chances of how successful it will be in pursuing the grievance. In this case, Mr. Hucker thought that the grievance could possibly be dismissed at arbitration. He then went out and sought the best settlement he could get for Mr. Brown. These actions do not contravene section 37 of the Code.

The part of Mr. Brown's complaint regarding the fact that he had not been formally notified by the employer of the conditions of his reinstatement must also be dismissed. Mr. Brown had in part brought about his own misfortune. It is clear from his complaint that he knew, at least on December 17, the conditions of his reinstatement.

"... The meeting of December 17, 1990 was the first time I had any contact as to my reinstatement and conditions thereto. ..."

Also on December 20, Mr. Hucker sent a letter to Mr. Longworth informing him of the terms and restrictions of the reinstatement.

We also note that in a letter to Mr. Brown dated January 28, 1991, Mr. Hucker did address this very issue:

"As to any claim for wages for the period from November 1, 1990 to December 17, 1990, I would suggest that you first re-establish your employment relationship with CP Rail. In order to make an accurate determination as to any entitlement of wages between November 1, 1990, and December 17, 1990, I will need to know of your actions between those dates after you were informed by Local Chairman Longworth or the Company of your reinstatement.

I would ask that you send this office any correspondence concerning your reinstatement that you may have received from Local Chairman Longworth and any notes of any conversations you may have had with Local Chairman Longworth between October 19, 1990 and January 12, 1991. I would also ask that you inform this office of the precise date on which Local Chairman Longworth contacted you to inform you of your reinstatement."

The Board does not know whether or not Mr. Brown took up Mr. Hucker's invitation, but it is obvious that Mr. Hucker was prepared to do something if Mr. Brown was entitled to compensation.

In his closing argument to the Board, Mr. Brown appeared to amend the remedy sought. He was now asking that the Board make a finding on whether or not Mr. Hucker had done his job properly and had complied with the collective agreement.

These are the kinds of questions the Board is not mandated to deal with under section 37. It is not the Board's role to pass judgment on whether or not union

representatives are doing a good job or not. In Peter Klippenstein (1991), as yet unreported CLR&B decision no. 889, the Board said the following:

"... Even if a union is wrong in the opinion of the Board when it decides not to proceed with a grievance, this is not sufficient grounds for the Board's intervention provided the decision was made in good faith. ..."

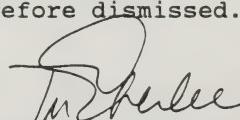
(page 6)

The Board then went on to say:

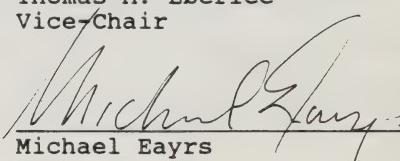
"...However, in the absence of any of the unlawful elements which we referred to earlier, and where there is no evidence of gross negligence on the union's part, the question becomes one of union efficiency or, in other words, the quality of representation which is not a matter for consideration under section 37."

(page 6; emphasis added)

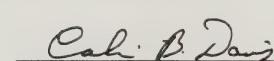
In conclusion, the union has not acted contrary to the Code; the complaint is therefore dismissed.



Thomas M. Eberlee
Vice-Chair



Michael Eayrs
Member



Calvin B. Davis
Member

DATED at Ottawa this 23rd day of December 1991.

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SUMMARY

The Syndicat général de la radio
(CSN) CKVL, applicant, and Radio
Futura Limitée (CKVL/CKOI) and
Communications Mont-Royal,
employers.

Board Files: 725-279
745-3858
745-3969

Decision no. 913

RÉSUMÉ

Le Syndicat général de la radio
(CSN) CKVL, requérant, et Radio
Futura Limitée (CKVL/CKOI) et
Communications Mont-Royal,
employeurs.

Dossiers du Conseil: 725-279
745-3858
745-3969

Décision n°: 913

The union filed with the Board an application seeking a declaration of unlawful lockout alleging that the employer's decision to proceed with the lay-offs contrary to the collective agreement was aimed at forcing the employees to accept amendments to that agreement. The Board found that the employer's decision did not constitute an unlawful lockout, considering the context in which the decision was applied.

The union also filed two unfair labour practice complaints alleging violation of section 94 of the Code. The Board applied section 98(3) to the first complaint and dismissed the second.

Le syndicat a présenté devant le Conseil une demande de déclaration de lock-out illégal alléguant que la décision de l'employeur de procéder à des mises à pied contrairement à la convention collective avait pour but de contraindre les employés à accepter des modifications à cette convention collective. Le Conseil a jugé que la décision de l'employeur ne constituait pas un lock-out illégal compte tenu du contexte où cette décision a été appliquée.

Le syndicat a aussi déposé deux plaintes de pratiques déloyales alléguant violation de l'article 94 du Code. Le Conseil a appliqué le paragraphe 98(3) à l'égard de la première plainte et a rejeté la deuxième.



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Reasons for decision

Syndicat général de la radio
(CSN) CKVL/CKOI,
applicant,
and
Radio Futura Limitée (CKVL/
CKOI) and Communications Mont-
Royal,
employers.

Board Files: 725-279
745-3858
745-3969

The Board was composed of Ms. Louise Doyon, Vice-Chair, and
Ms. Ginette Gosselin and Mr. Robert Cadieux, Members.

Appearances

Mr. Guy Martin, accompanied by Ms. Johanne Miron, for the
applicant;

Mr. Jean-Pierre Belhumeur and Ms. S. Alexandra Girard,
accompanied by Mr. François Godet, for the employers.

These reasons for decision were written by Ms. Louise Doyon,
Vice-Chair.

I

The proceeding

On February 20, 1991, the Board received from the Syndicat
général de la radio (CSN) CKVL/CKOI (the union) an
application seeking a declaration of unlawful lockout and
a complaint of unfair labour practice (files 725-279 and
745-3858). The union asked the Board to order Radio Futura
Limitée to

"(A) refrain from declaring or causing a lockout;

(B) continue to employ the employees affected by a lay-off notice;

(C) observe and comply with the terms and conditions of employment specified in documents R-2 and R-4;

(D) cease communicating directly with the employees represented by the Syndicat général de la radio (CSN) CKVL/CKOI, without prior authorization from the union;

(E) give forthwith notice to all employees concerned of the order issued by the Canada Labour Relations Board."

(translation)

The collective agreement binding the parties provides, on the one hand, for the minimum number of positions or "job floor" that the employer must maintain during the term of the collective agreement and specifies, on the other hand, the situations and the applicable procedures where the employer deems it necessary to lay off employees. In that case, where the employer alleges that it is experiencing financial difficulties directly attributable to the business, and not to an external cause, it shall make available to the union the documents that will permit an analysis of the company's financial situation. Should the parties fail to agree on the causes or the effects of this situation, in relation to possible lay-offs, one of the parties can refer the case to arbitration. If the employer intends to proceed with lay-offs, it must give the employees and the union 60 days' notice.

At the hearing on February 28, 1991, counsel for the employer alleged that the Board lacked jurisdiction to hear this case, that is to determine the employer's right to proceed with the lay-offs announced in the notices sent to certain employees on February 8, 1991, because this matter had been referred to arbitration in accordance with the above-cited provisions of the collective agreement. He

therefore asked that the hearing be suspended. The Board noted the employer's assurance not to proceed with the lay-offs and not to alter the other terms and conditions of employment until the arbitrator had rendered a final decision. The union agreed to this request. The Board suspended the hearing in the two files until the arbitrator rendered his decision or until the Board decided, at the request of either party, to resume the hearing in the interim.

The uncontested facts that gave rise to the dispute are as follows.

1. In June 1990, Radio Futura Limitée (the employer) asked the union to amend certain provisions of the collective agreement, specifically to agree to a reduction of the job floor, given the company's precarious financial situation. An initial agreement was reached in October 1990 reducing the job floor from 58 to 45 positions.

2. In December 1990, the employer asked for additional amendments in a document concerning phase II of the Recovery Program. These changes consisted in the abolition of 9 permanent positions in the newsroom and 14 other temporary positions. At the time, the collective agreement provided for a minimum of 12 permanent positions in the newsroom. On January 14, 1991, a general meeting of the union rejected these requests.

3. On February 8, 1991, on learning of the union's answer, the employer referred the dispute to arbitration pursuant to clause 6.07 of the collective agreement. The same day, it sent 27 employees lay-off

notices that were to take effect on April 8, 1991, thereby implementing the proposals already made.

4. On February 14, 1991, the employer sent all employees, unionized and non-unionized, a memorandum explaining the company's situation. There was no prior agreement with the union concerning the sending of this memorandum or its contents.

According to the union, the employer's actions, in particular its decision to lay off 27 employees without the union's agreement and contrary to the provisions of the collective agreement, constitute an unlawful lockout to the extent that, specifically, these actions are aimed at compelling the employees to agree to terms and conditions of employment, in this case amendments to the collective agreement. The union further alleges that the manner in which the employer communicated with the employees on February 14, 1991 constitutes an unfair labour practice within the meaning of section 94(1)(a) of the Code.

On April 8, 1991, arbitrator François Hamelin allowed the employer's grievance. He made the following findings.

"- The tribunal allows the employer's grievance.

- It declares that the second (revised) recovery program of January 18, 1991 meets the requirements of clause 6.11(a)(2) of the collective agreement and must be applied.

- It orders the employer to apply the bulk of the savings thus earned to reducing the budget deficit and not to programming, in the manner described earlier in the decision.

- It orders the parties to amend the provisions of the collective agreement accordingly.

- It retains jurisdiction with respect to the implementation of this arbitral award."

(translation)

The union subsequently informed the Board that it was applying for judicial review of this decision in the Superior Court. The motion in evocation was dismissed and the union appealed this judgment. The judgment of the Court of Appeal is pending.

On July 10, 1991, the Board received from the union a second complaint of unfair labour practice (file 745-3969) alleging violation of sections 94(1) and 94(3)(a)(i), (b), (d) and (e) of the Code.

This complaint repeats some of the facts alleged in the application seeking a declaration of unlawful lockout and alleges new facts. These allegations can be summarized as follows.

1. Since October 1990, the employer has refused or neglected to remit to the union the dues collected through payroll deductions, contrary to the provisions of the collective agreement. The union filed a grievance. It further claims that this omission contravenes section 94(1)(a) of the Code.

2. Since September 1990, the employer has refused or neglected to remit to the trustee of the retirement plan the amounts collected from the employees as contributions to this plan and to pay its share of contributions. The union referred a grievance to arbitration and filed a complaint with Revenue Canada, Taxation.

3. Following the lay-off of the 27 employees, on a number of occasions the employer recalled certain permanent employees, requiring them to work as temporary employees or with a different employee status from the status they held

prior to April 1991. The union filed grievances contesting these situations.

4. Since the arbitral award of April 8, 1991, the employer has contravened the collective agreement, specifically by having duties performed by employees in classifications other than those whose incumbents are required to perform these duties or by amending certain job descriptions. All these situations have been the subject of grievances.

5. Finally, the union claims that effective July 1, 1991, the employer stopped paying the laid-off employees the severance pay provided for in the collective agreement. A grievance was filed.

The union argues that these actions, including laying off 27 employees in accordance with arbitrator Hamelin's award, constitute unfair labour practices. These actions force the union to resort systematically to the grievance and arbitration procedure, while the employer knows full well that these remedies entail major delays, the discrediting of the union and the eventual disaffiliation of its members. The union further argues that by requiring some of its employees to perform their duties in a manner not prescribed by the collective agreement, the employer contravenes section 94(3)(b) of the Code.

The union asks that the Board issue a general order enjoining the employer to cease violating section 94. It also asks that the Board order the reinstatement in their duties of the employees laid off on April 8, 1991 and the restoration of all benefits lost, pending the rendering of a final and uncontested judgment in the wake of the application for judicial review. Finally, the union asks that the Board order the employer to take the necessary

steps to grant the union the remedies requested in the grievances filed and order the employer to comply with the collective agreement, as amended by the agreement of October 1990.

Following receipt of this second complaint, the employer asked the Board, first, how it intended to deal with all of the files, given the facts common to them all and the arbitral award of April 8, 1991. It also asked the chair of the panel to withdraw from the proceeding on the ground that she had represented the opposing party in a dispute between respective clients some 10 years earlier. Written arguments on this matter were submitted before the hearing. When the hearing began on September 25, the Board first informed the parties that it would combine the three files for hearing purposes. It then informed them that it rejected the request to withdraw, without prejudice to its right to issue reasons for its decision in this regard. Counsel for the employer then asked to present oral arguments on his request to withdraw. The Board heard him, as well as counsel for the opposing party. These additional arguments did not persuade the Board to vary its initial decision. The Board did not present any additional reasons on this question.

Given the nature of the proceedings and circumstances of these cases as already revealed, the Board asked that the parties submit arguments on the merits of the conclusions and the remedies sought in the three files, assuming the facts to be true. It reserved the right to require additional evidence if it subsequently deemed it necessary, which it did not.

Additional information was adduced during the presentation of arguments. The employer established that the arrears in union dues had largely been remitted in July and August 1991 and the balance paid on September 23, 1991. The union admitted these facts, pointing out, however, that it was not withdrawing its request in this regard because the failure to remit the dues within the prescribed time limits constituted an unfair practice. As for the contributions not remitted to the trustee of the retirement plan, the parties signed an agreement on August 1, 1991 establishing the terms and conditions of remittance of the arrears. The employer, however, had not fully met the deadline and a balance was still owed as of the date of the hearing. The union also submitted additional information in support of the allegations it made in its second complaint. For example, it alleged that on at least three occasions, the employer had contravened the collective agreement by recalling employees to work without regard to seniority and by altering the employment status of certain persons. It further alleged that, contrary to the arbitral award of April 8, 1991, the employer had improperly applied the savings earned from the application of the recovery measures. Grievances were filed in all these matters.

II

Decision

Having heard the evidence and arguments, the Board disposes of the three files as follows.

The application seeking a declaration of unlawful lockout
(file 725-279)

In this application, the union alleges that in notifying, on February 8, 1991, 27 employees of its intention to lay them off on April 8, 1991, the employer was preparing to declare a lockout prohibited by the Code, thereby contravening the collective agreement. Section 3 of the Code defines "lockout" as follows:

"'lockout' includes the closing of a place of employment, a suspension of work by an employer or a refusal by an employer to continue to employ a number of his employees, done to compel his employees, or to aid another employer to compel his employees, to agree to terms or conditions of employment."

Section 92, for its part, stipulates the following:

"92. Where a trade union alleges that an employer has declared or caused or is about to declare or cause a lockout of employees in contravention of this Part, the trade union may apply to the Board for a declaration that the lockout was, is or would be unlawful and the Board may, after affording the employer an opportunity to be heard on the application, make such a declaration and, if the trade union so requests, may make an order

(a) enjoining the employer or any person acting on behalf of the employer from declaring or causing the lockout;

(b) requiring the employer or any person acting on behalf of the employer to discontinue the lockout and to permit any employee of the employer who was affected by the lockout to return to the duties of his employment; and

(c) requiring the employer forthwith to give notice of any order made against the employer under paragraph (a) or (b) to any employee who was affected, or would likely have been affected, by the lockout."

The employer claims that it complied with the collective agreement by requesting the intervention of the arbitrator, in accordance with the rules negotiated, specifically to secure the reopening of the collective agreement authorizing

it to reduce the job floor and hence to proceed with the lay-offs announced. The hearing into this application, which was suspended by agreement of the parties on February 28, 1991, resumed on September 25, 1991 in the circumstances and under the terms described earlier. In considering this case, the Board took into account all existing facts at all relevant times, in particular the fact that the provisions of the collective agreement, specifically those defining the job floor, on which the union relied in arguing that there had been an unlawful lockout in February 1991, had been altered by the arbitral award of April 8, 1991.

A review of the file, in particular of the chronology of events since June 1990, as well as the employer's recourse to the collective agreement to settle this kind of dispute, has not persuaded the Board that the employer had declared an unlawful lockout on April 8, 1991. The lay-off of the 27 employees in question, in the circumstances in which it occurred, was not intended to compel employees unlawfully to agree to terms or conditions of employment.

Accordingly, the Board dismisses the application for a declaration of unlawful lockout.

The complaint of unfair labour practice of February 20, 1991
(file 745-3858)

On February 14, 1991, approximately a week after the lay-off notices were sent, the company's general manager sent all employees a memorandum. In it, he set out the employer's position on the company's financial situation and that of the industry in general. He also referred to the agreement that had permitted an initial reduction of the job floor, making clear, however, that this reduction in the number of positions had not solved the company's financial

problems. In conclusion, he explained that the employer had had to send out lay-off notices, given both the financial imperatives and the impossibility of reaching an agreement with the union on additional recovery measures. The memorandum also explained that the employer had referred this whole question to arbitration. The union claims that this memorandum constitutes employer interference with the representation of employees, contrary to section 94(1)(a) of the Code, which reads as follows:

"94.(1) *No employer or person acting on behalf of an employer shall*

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; ..."

Past Board decisions establish the criteria used to determine what type of communications an employer is authorized to carry on with its employees under the Code. The Board requires an employer facing a union organizing campaign to maintain strict neutrality (see General Aviation Services Limited (1979), 34 di 791; and [1979] 2 Can LRBR 98 (CLRB no. 182); and Télévision Saint-François Inc. (1981), 43 di 175 (CLRB no. 306)) and to limit itself to matters relating to the conduct and operation of the affairs of the company when it communicates directly with its employees (see American Airlines Incorporated (1981), 43 di 114; and [1981] 3 Can LRBR 90 (CLRB no. 301); and Bank of Montreal (Bank and Cecil Streets Branch, Ottawa) (1985), 61 di 83; and 10 CLRBR (NS) 129 (CLRB no. 518)). These criteria apply at all times, including in cases where the parties have a long-established labour relations history, as in the instant case. In the latter situation, however, the nature, content and context of the communications alleged against the employer are factors the Board will have to consider in assessing the impact of the employer's conduct on the union's right of representation (see Canada

Post Corporation (1985), 63 di 136 (CLRB no. 544); and
Sedpex Inc. (1988), 72 di 148 (CLRB no. 667)).

The memorandum of February 14, 1991 to all personnel presents a chronology of the events of the preceding months, describes the proposals exchanged and the respective reactions of the parties to the existing situation, that is, the rejection of the employer's latest requests, the sending of lay-off notices and the referral of the dispute to arbitration by the employer. There is no doubt that the employer used this memorandum to try and justify its position. The reasons given by the employer to this end are not, however, new. They had been known to the union for a number of months and on at least two occasions, during acceptance of the agreement of October 1990 and rejection of the request of January 1991, the employees had the opportunity to discuss and pass judgment on them with the bargaining agent. The Board does not believe that this memorandum, in the circumstances in which it was issued, is a factor whose nature is such as to undermine the union's credibility or harm its ability to fulfil its duty of representation. The Board concludes that the memorandum of February 14, 1991 does not constitute a violation of section 94(1)(a) of the Code and dismisses the complaint.

The complaint of unfair labour practice of July 10, 1991
(file 745-3969)

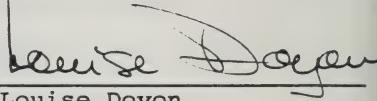
At the hearing, the Board raised the question of the application of section 98(3) of the Code to this file. This section reads as follows:

"98. (3) The Board may refuse to hear and determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board."

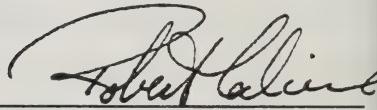
The Board decides that its intervention in this dispute, which turns essentially on the meaning and scope of the collective agreement, in particular on the effects that the arbitral award of April 8, 1991 has on the collective agreement, would not enhance the protection of the rights that the union claims are jeopardized. The union has not satisfied the Board that the matters of disagreement alleged in its complaint are outside the scope of the collective agreement, because the conclusions sought specifically request the Board to order the employer to comply with the provisions of the collective agreement. These matters fall within the jurisdiction of the grievance arbitrator and involve first and foremost the interpretation and application of the collective agreement.

Moreover, the Board is not convinced, as the union argues, that the systematic and repeated violations of the collective agreement are tantamount, in the instant case, to a clear and deliberate attempt by the employer to discredit the union, thus constituting unfair labour practices that are contrary to section 94 of the Code. Having said this, the Board does not rule out the possibility that a union, forced by the negligence or bad faith of an employer to resort systematically to the grievance procedure to ensure compliance with the collective agreement, can establish that such actions constitute unfair practices. However, the Board does not believe that the facts alleged here jeopardize the exercise of a statutory right, requiring intervention by the Board (see Canada Post Corporation (1989), 76 di 212 (CLRB no. 729); Canada Post Corporation (1990), 81 di 28; and 12 CLRBR (2d) 117 (CLRB no. 800); and Ottawa-Carleton Regional Transit Commission (1990), 81 di 88 (CLRB no. 805)).

For these reasons, the Board exercises its discretion under section 98(3) of the Code and finds, having regard to the facts of the instant case, that it is not appropriate to hear and determine the present complaint. Accordingly, the complaint is dismissed.


Louise Doyon
Vice-Chair


Ginette Gosselin
Member


Robert Cadieux
Member

ISSUED at Ottawa, this 16th day of January 1992.

CCRT/CLRB - 913

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Summary

SGS SUPERVISION SERVICES INC., APPLICANT, AND INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 518, RESPONDENT.

Board File: 725-305

Decision No.: 914

These reasons deal with an application under the unlawful strike provisions in section 91 of the Canada Labour Code (Part I - Industrial Relations). The circumstances giving rise to the application took place on January 16, 1992 at the Port of Vancouver when members of the union refused to do their normal work because the employer had implemented a direct deposit pay system which the union and its members disapproved of.

The Board found that the union had authorized or declared an unlawful strike and that its members were participating in the unlawful activities. In the circumstances, however, where the brief work stoppage was over and the parties had agreed to resolve the dispute over the direct deposit pay system through expedited arbitration, the Board refused to issue a declaration of an unlawful strike or a cease and desist order.

The Board took this opportunity to address the British Columbia longshoring community as a whole and voice its concerns about an alarming increase in the number of incidents of unlawful job action during the past year. The Board said that it would continue to seek labour relations solutions to labour relations problems; however, the Board cautioned that there comes a time when it would have to take steps to uphold the law should these skirmishes outside the law continue.

Résumé de Décision

SGS SUPERVISION SERVICES INC., REQUÉRANTE, ET LE SYNDICAT INTERNATIONAL DES DÉBARDEURS ET MAGASINIERS, SECTION LOCALE 518, INTIMÉ

Dossier du Conseil: 725-305

Décision n° 914

Les présents motifs portent sur une demande présentée en vertu de l'article 91 du Code canadien du travail (Partie I - Relations du travail). Les circonstances qui ont donné lieu à la demande se sont déroulées le 16 janvier 1992 au port de Vancouver, où les membres du syndicat ont refusé d'effectuer leur travail normal parce que l'employeur avait mis en place un système de dépôt automatique que le syndicat et ses membres critiquaient.

Le Conseil juge que le syndicat a déclaré ou autorisé une grève illégale et que les membres du syndicat participaient à des activités illégales. Toutefois, puisque le court arrêt de travail est terminé et que les parties s'entendent pour régler le différend concernant le système de dépôt automatique au moyen de l'arbitrage accéléré, le Conseil refuse de faire une déclaration de grève illégale ou de rendre une ordonnance de ne pas faire.

Le Conseil profite de l'occasion pour parler à l'ensemble des membres de la communauté de débardeur en Colombie-Britannique et pour lui faire part de ses préoccupations quant à l'augmentation inquiétante d'arrêts de travail illégaux au cours de la dernière année. Le Conseil dit qu'il continuera de tenter de trouver des solutions inhérentes aux problèmes en relations de travail; cependant, le Conseil met les parties en garde qu'il devra prendre certaines mesures pour faire respecter la loi si ces arrêts illégaux persistaient.



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Reasons for decision

SGS Supervision Services Inc.,

applicant,

and

International Longshoremen's
and Warehousemen's Union, Local
518,

respondent.

Board File: 725-305

The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Messrs. Calvin B. Davis and François Bastien, Members.

Appearances:

Norman K. Trerise, for the applicant; and

Gordon Weststrand and Barry Holloway, for the respondent.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

On January 16, 1992, SGS Supervision Services Inc., (SGS or the employer) filed this application under section 91(1) of the Canada Labour Code (Part I - Industrial Relations) seeking a declaration that the International Longshoremen's and Warehousemen's Union, Local 518, (the ILWU or the union) had authorized and declared an unlawful strike and that certain union members were participating in the unlawful activities. The employer also asked the Board to issue a cease and desist order.

SGS is a Canadian affiliate of a world-wide materials testing organization. It provides testing, inspecting, checking and analysis services related to commercial transactions. The employees affected by this application are involved in the co-ordination and inspection of commodities destined for export at the Port of Vancouver.

According to SGS a dispute had arisen between the union and the employer over the implementation of a direct deposit pay system which had taken effect on January 1, 1992 for all employees of SGS across Canada. Prior to the implementation of this new system the union had voiced its disapproval and certain union members had refused to supply the employer with the information necessary for their paycheques to be deposited directly into their bank accounts. The union had initiated a grievance against the new payroll system under the provisions of the collective agreement and, by letter dated December 23, 1991, Mr. Barry Holloway, President of the union had requested that the grievance proceed to arbitration. In its application, SGS described the situation as follows:

- "7. *Approximately 17 bargaining unit members employed by SGS in the last pay period did not provide to SGS an account number to enable their salaries to be directly deposited into their bank accounts.*
8. *The employees have taken the position that they are entitled to receive a pay cheque as opposed to a direct deposit into their accounts.*
9. *SGS has opened bank accounts at the Royal Bank of Canada for each of the employees for whom they did not have complete banking information.*

10. SGS advised the Union that it required all time cards to be deposited with SGS prior to 9:00 a.m. on Wednesday, January 15, 1992. Several time cards were not received and as a result the time on those time cards could not be processed by the Royal Bank for direct deposit on this round of payroll.
11. The employees received their pay stubs on January 16, 1992 at approximately 10:30 a.m. Immediately, there was a reaction and individual employees took the position that they were entitled to receive a pay cheque and would not work until they did.
12. At Vancouver Wharves, SGS had four people working as samplers of a ship and rail cars. As a result of their refusing to carry out their work, the ship is not being loaded and the rail cars are not being unloaded.
13. At Pacific Coast Terminals, three SGS employees are refusing to sample sulphur waiting to be unloaded from rail cars in respect of a shipment by Sultran Ltd.
14. Dave Cochrane, the Secretary-Treasurer of the Union, and Rick Cookson who sampled a stockpile of sulphur at Vancouver Wharves, never returned to SGS's office.
15. Many employees of SGS who are members of the Union have told members of management that they are not prepared to work until they receive their pay cheque 'in the usual manner'.
16. The Union has actively promoted the position that employees should not co-operate in the new payroll procedure and has actively promoted the current work stoppages.
17. As a result of the withdrawal of services by members of the Union, SGS is experiencing financial loss."

The union did not reply formally to the application but it denied that it had authorized or declared an unlawful strike when it appeared before the Board at Vancouver on January 21, 1992. Union representatives told the Board that the aforescribed activity was an

unconcerted individual response by employees to an alleged intrusion into their private affairs by the employer.

For the purposes of expediting the hearing into this matter, the union did agree with the following statement of facts:

- (1) *There has been 4 work stoppages in the past 6 months;*
- (2) *There was a work stoppage for approximately 3 hours on January 16, 1992;*
- (3) *The work stoppage was led by example by the union's Secretary-Treasurer and several members of the union's Executive Committee;*
- (4) *The work stoppage was apparently not co-ordinated or directed by the union formally;*
- (5) *The employer has suffered damage to its reputation and possible demurrage claims exposure as a result of the work stoppage;*
- (6) *The collective agreement was still in full force and effect on January 16, 1992; and*
- (7) *The union, upon being advised of the work stoppage, promptly secured the return of all but 3 employees to work.*

The employer and the union also agreed to resolve their dispute over the implementation of the direct deposit pay system through expedited arbitration.

II

In these circumstances where a brief work stoppage is over and steps have been taken by the parties to resolve the underlying cause, the Board would normally consider the matter closed. It is not the Board's practice to issue retroactive declarations of unlawful strikes. In

fact, rarely does the Board even proceed with a hearing if the unlawful work stoppage has ceased prior to the scheduled hearing date. The labour relations considerations behind this approach have been explained on many occasions by this Board as well as by Boards in other jurisdictions. For example, see Newfoundland Steamships Limited (1974), 7 di 8; [1975] 2 Can LRBR 275; and 75 CLLC 16,147 (CLRB no. 36); National Harbours Board (1979), 33 di 530; [1979] 3 Can LRBR 502; and 79 CLLC 16,204 (CLRB no. 195); and Acoustical Association Ontario et al. (1975), OLRB July Rep. 539. For our purposes here, we need not delve into this well-settled area of labour law, it is sufficient to reproduce the words of Professor D.D. Carter of the OLRB on this topic expressed at pages 541-542 of the latter of the aforesaid three decisions:

"... The board in exercising its discretion to grant a declaration under s.82 has not treated the declaration as a punitive measure but, quite the contrary, as a measure to encourage accommodation between bargaining parties. See Norfolk Hospital Association, [1974] OLRB Rep. 581. Collective bargaining often gives rise to situations where the line between legal and illegal conduct becomes blurred. In this type of situation, immediate recourse to criminal sanctions could be undesirable, creating the risk that the give-and-take of collective bargaining might be overshadowed by considerations of crime and punishment. The declaration performs the useful function of providing an authoritative determination on the legality of the conduct, without the application of criminal sanctions. The declaration may, of course, open the door to civil compensation under s.84, but this consequence is not relevant to this particular case where the applicants claim that a collective agreement is in operation. Aside from the effect of s.84, then, the declaration performs an admonitory function, and not a punitive function, providing a warning that the conduct in question contravenes the strike prohibition in the Act.

7. Given the function to be performed by the declaration, the Board has been reluctant to grant a declaration where a strike has been settled before the hearing of the application.

The reasons for this approach are fully explained in both Beatty Bros. (1965), 66 CLLC para. 16,049 and National Refractories (1963), 63 CLLC para. 16,276. The general thrust of these reasons is that, once the strike has disappeared, then, as a general rule, no useful purpose can be served by a determination of the legality of the activity. In other words, the declaration has been regarded as a procedure for preventing the continuation of strikes, and not as a procedure for a retrospective assessment of the legal position of one of the bargaining parties. To take this latter approach would create the danger that intervention by the Board might upset the settlement already reached. It must be recognized, moreover, that labour relations remedies should be applied selectively. If the Board were to grant the declaration as a general rule in cases where the strike has been settled, there is the very real possibility that the remedy will be far less effective in those cases where the strike is continuing. Over-usage is likely to debase the remedy, so that it will not be taken seriously in those cases where it is most needed. The Board's reluctance to grant the remedy, moreover, now serves as an incentive to end what might be an illegal strike. Once unions and employees receive notice of the application of the declaration, they know that, if there is an immediate return to work, there is a substantial likelihood that there will be no further intervention by the Board. Certainly, from an industrial relations perspective, this is a very desirable result."

(emphasis added)

In this particular application the Board did proceed with the hearing notwithstanding that the work stoppage had ceased and that the parties had arrived at a settlement as to how they were going to resolve the dispute that was at the root of the job action. The Board insisted on proceeding mainly because of the alarming increase in the number of unlawful work stoppages in British Columbia during this past year or so and more particularly in the longshoring industry. As indicated in the agreed statement of facts in this case, there have been four other instances of illegal job action affecting the operations of SGS within the last six months. The Board is also aware of at least

five others affecting other employers and different Locals of the ILWU at Vancouver during the past year. This works out to the rate of approximately one unlawful strike per month on the Vancouver waterfront which naturally causes the Board concerns about the likelihood of a developing disrespectful attitude for the law and also for the possibility of an abuse of the Board's process. Each time there is an unlawful strike application and the Board sends one of its officers in to mediate, if employers continually cave in on the underlying issue, it means that the unions are gaining something through unlawful work stoppages during the closed period in the collective agreement. This is not what the scheme of the Code is supposed to be about. This time, the Board came to see for itself.

III

Having now heard the parties to this application and in particular the submissions of Mr. Gordon Weststrand who is the ILWU's President, Canadian Area, the Board feels confident that the rash of unlawful job actions at the Port of Vancouver has come to an end. Mr. Weststrand assured us that the spirit of the Code vis-à-vis industrial peace will be lived up to and that all disputes arising from the administration of the various collective agreements on the waterfront will be resolved through the grievance-arbitration process without stoppages of work. This is, of course, what is required by law.

This being the first occasion that the Board has had to speak to the British Columbia longshoring community in these terms, we do not intend to issue any ultimatum; however, we want to make it clear that the Board will stay on the sidelines only so long, there comes a time when steps have to be taken to ensure that the law is upheld. This has already been made clear at ports in other parts of the country:

"We shall deal first with the employer's concern that the Board's reluctance to take action after the fact in some instances under sections 182 and 194 (now sections 89 and 91), encourages certain unlawful acts while curtailing access to redress for employers who are affected by those acts. If that perception exists, then perhaps this is an appropriate time to make sure that the Board's policy statements are not taken as a licence to break the law with impunity.

Earlier in this decision, we set out briefly the legislative scheme within which the labour relations community in the federal jurisdiction is expected to operate. The rules are clear: no job action or work stoppages when a collective agreement is in effect or during negotiations until the conciliation process has been waived by the Minister of Labour or until that process has been exhausted. Under the day-to-day stresses of an adversarial labour relations system, it is unrealistic to expect absolute obedience to those severe restraints on human reaction and it is only natural that there will be an occasional transgression outside the scheme. How the Board responds to those transgressions depends on the facts of each case. Provided that unlawful acts are not persistent, the Board will continue its endeavours to seek labour relations solutions to labour relations problems in accordance with its stated policies. However, persistent and knowing disregard for the legislative scheme or disobedience to a Board order will result in the use of the full arsenal of deterrents available to the Board under the Code."

(St. John's Shipping Association Limited (1985), 61 di 39; 10 CLRBR (NS) 118; and 85 CLLC 16,033 (CLRB no. 514) at pages 47-48; 127-128; and 14,229; emphasis added)

More recently, the Board had the following to say to the longshoremen at the Port of Halifax:

"Finally, the Board feels obliged to inform Local 269 and its members and, for that matter, all of the other unions and their members who participated in the close-down of the Port of Halifax on October 30 or 31, 1988, that this Board will not be intimidated by such illegal actions. The Board cannot condone any act which places persons or parties outside the law and it will not tolerate deliberate unlawful actions. Unlawful strikes are costly, not only to those who use the facilities of the Port of Halifax but also for the Board who has to muster a panel and travel to the scene and rent a hearing room, etc. If Local 269, or any other union at the Port of Halifax engages in any further unlawful activities related to these issues, the Board will consider, in addition to all of its other remedial powers in the Code, the assessment of costs."

(Halifax Grain Elevator Limited (1989), 76 di 157 (CLRB no. 725) at page 170; emphasis added)

The situation at the Port of Vancouver is still a long way from reaching the stage where the Board has to abandon its practice of seeking labour relations solutions to labour relations problems in order to uphold the letter of the law. The Board is confident that it will not be forced into taking a hard-line and that management and labour in the longshoring industry can put their own house in order. We say both management and labour because, as we have witnessed here, job action is generally a reaction to some form of initiative from management. These initiatives more often than not tend to alter existing practices and unfortunately some of them are implemented at extremely sensitive periods of time such as, for example, while negotiations are taking place for the renewal of a

collective agreement when the scheme of the Code calls for a freeze of the status quo in order to maintain the balance of power at the bargaining table (section 50(b)). Invariably, the response from trade unions and their members is to take instant reprisals by way of job action rather than go through the sometimes lengthy process of seeking a remedy from this Board which, of course, requires Ministerial Consent. These types of situations can be avoided if both sides are aware of and accept their responsibilities under the Code. As we have already said, we are confident that this will occur on the waterfront. In the meantime, the Board's stated policies relating to unlawful strikes will remain in effect.

IV

Turning to the merits of this particular application, the Board has no hesitation in finding that the union declared or authorized an unlawful strike and that certain of its members participated in the unlawful activities. The actions of the union Secretary-Treasurer and other Executive members of the union who participated in the work refusals could be taken no other way than to clearly indicate that the membership was expected to follow their leaders' example. The union's claim that the employees reacted on an individual and unconcerted manner is simply not acceptable in these circumstances. In this regard, we would direct the union's attention to the following passage from Canadian National Railway Company (1989), 79 di 82; and 90 CLLC 16,010 (CLRB no. 770):

"Contrary to what some may preach, it is usually relatively easy for the Board to spot concerted activity even where it is disguised as a lawful exercise of individual rights or a sudden concern for safety and strict adherence to rules. The concentration of the job action and its timing relative to other events such as ongoing negotiations, changes in dispatch rules, the suspension of union representatives or, like here, a work study that has a possible negative impact on the workforce, usually tell the tale and reveal the underlying cause. This usually leaves little room for doubt what the actions by the union and its members are all about. As far as the union's involvement, there is a presumption in this regard.

'In situations like this, in the midst of negotiations, where there is a mass refusal to work that is so obviously well orchestrated, and in the absence of any evidence to the contrary, there must be a presumption that the trade union is the architect.'

(Air Canada (1984), 59 di 67; and 8 CLRBR (NS) 397 (CLRB no. 490), pages 79; and 409)'"

(pages 91-92; and 14,107)

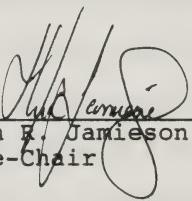
Here, the refusals can hardly be described as massive; however, the timing and the orchestration of the activities clearly show that the work refusals were concerted and they were designed to restrict or to limit the employer's output. This is all that is required for a finding of an unlawful strike in the federal jurisdiction when job action is taken outside of the time permitted for strikes in the Code.

As far as the remedies sought by SGS, the Board does not consider it appropriate in the circumstances to issue the declaration of an unlawful strike or the cease and desist order that the employer requested. To do so retroactively would not only be contrary to the Board's stated policies and practices, it would not be in the best interests of sound labour relations. The primary

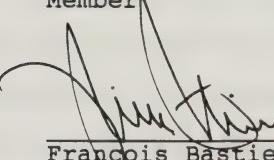
purpose of these reasons is to get the message across to the longshoring industry as a whole that these skirmishes outside the law cannot continue and it would be wrong in our opinion to make a scapegoat of this local of the ILWU by varying from the Board's past practice of no retroactive orders without having given due warning. Furthermore, the Board is conscious of the fact that these parties are presently engaged in collective bargaining and a declaration of an unlawful strike at this time could upset the balance at the bargaining table in that it could be held over the union's head in order to gain concessions during negotiations. This is not a desirable result of these proceedings.

The Board therefore exercises its discretion not to issue a declaration of an unlawful strike nor will it issue a cease and desist order. This file is closed.

The foregoing is a unanimous decision of the Board.


Hugh F. Jamieson
Vice-Chair


Calvin B. Davis
Member


Francois Bastien
Member

DATED at Ottawa this 31st day of January, 1992.

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Summary

CANADIAN UNION OF POSTAL WORKERS,
AND GORDON MOULTON, AND ROGER
LEWIS, COMPLAINANTS, AND CANADA
POST CORPORATION, RESPONDENT.

Board Files: 745-4044
745-4055

Decision No.: 915

Between September 5, 1991 and late October 1991, the Canadian Union of Postal Workers and Canada Post Corporation engaged in negotiations under the direction of a mediator, looking to the conclusion of a new collective agreement. Although by this time CUPW had acquired the right to strike under the provisions of the Canada Labour Code (Part I - Industrial Relations), the negotiations took place on the basis of an agreement between the parties that they would observe the terms of the previous collective agreements, Canada Post would not "declare or cause" a lockout and CUPW would not "declare or authorize" a strike.

Despite this temporary cease-fire arrangement, groups of employees in the Halifax-Dartmouth area engaged in work disruptions in order to force Canada Post to attend to certain of their local concerns. They were disciplined by Canada Post.

CUPW complained to the Board that the discipline was contrary to section 94(3)(a)(vi) of the Code because the employees were only participating in legal strike activity. Canada Post argued that the cease-fire arrangement itself constituted a collective agreement and that the strike activity was illegal.

Résumé de Décision

LE SYNDICAT DES POSTIERS DU CANADA,
GORDON MOULTON ET ROGER LEWIS,
PLAIGNANTS, ET LA SOCIÉTÉ
CANADIENNE DES POSTES, INTIMÉE.

Dossiers du Conseil: 745-4044
745-4055

No de Décision: 915

Entre le 5 septembre 1991 et la fin octobre 1991, le Syndicat des postiers du Canada (le SPC) et la Société canadienne des postes (la Société) négociaient sous les auspices d'un médiateur, en vue de conclure une nouvelle convention collective. Bien qu'à ce moment le SPC avait obtenu le droit de faire la grève aux termes des dispositions du Code canadien du travail (Partie I - Relations du travail), les négociations se déroulaient conformément à l'entente conclue entre les parties selon laquelle ces dernières respecteraient les modalités des conventions collectives antérieures: la Société ne déclarerait ni provoquerait de lock-out et le SPC ne déclarerait ni autoriserait de grève.

Malgré cette entente de cessez-le-feu provisoire, des groupes d'employés de la région de Halifax-Dartmouth participaient à des arrêts de travail afin de forcer la Société à s'occuper de certaines de leurs préoccupations. La Société leur a imposé des mesures disciplinaires.

Le SPC s'est plaint au Conseil que les mesures disciplinaires allaient à l'encontre du sousalinéa 94(3)a)(vi) du Code parce que ces employés participaient à une grève légale. La Société prétend que l'entente conclue équivalait à une convention collective et que la grève était donc illégale.



The Board, in these reasons for decision, expressed doubt that the arrangement was in fact a collective agreement within the meaning of the Code at the time it was entered into. (Later, however, with the passage of legislation by Parliament, the previous collective agreements were deemed to cover the period of the negotiations.) The Board conceded that it could perhaps have found Canada Post in violation of the Code on technical grounds but that it would be unable to justify any remedy for the perpetrators of the work disruptions since they had broken their own union's no-strike commitment during the ongoing negotiations. The Board concluded that, since Parliament had reinstated the collective agreements, the best industrial relations solution would be to defer the matters involved to arbitration under section 98(3) of the Code. This would determine whether the discipline itself was justified.

The Board also gave notice to the complainants in several similar complaints that it proposes to invoke section 98(3) and defer them to arbitration unless it receives convincing reasons to the contrary.

Le Conseil n'est pas convaincu l'entente était en fait convention collective au sens du Code au moment où celle-ci a conclue. (Plus tard, cependant, après que le Parlement eut adopté la loi pertinente, les conventions collectives antérieures étaient réputées couvrir la période des négociations.) Le Conseil juge qu'il aurait peut-être pu juger la Société avait enfreint le Code pour une question de procédure toutefois, il ne pourrait justifier un redressement pour les participants à l'arrêt de travail puisque ceux-ci n'avaient pas respecté leur propre engagement de ne pas faire la grève pendant les négociations. Le Conseil juge que puisque le Parlement avait rétabli les conventions collectives, la meilleure solution en matière de relations du travail serait de renvoyer les questions à l'arbitrage aux termes du paragraphe 98(3) du Code. Le Conseil déterminerait à cette étape si les mesures disciplinaires étaient justifiées.

En outre, le Conseil a avisé les personnes en cause dans les plaintes semblables qu'il entendra invoquer le paragraphe 98(3) et renvoyer les plaintes à l'arbitrage à moins d'être convaincu du contraire.

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Reasons for decision

Canadian Union of Postal Workers, and Gordon Moulton, and Roger Lewis,

complainants,

and

Canada Post Corporation,
respondent.

Board Files: 745-4044
745-4055

The Board consisted of Vice-Chairman Thomas M. Eberlee and Members Michael Eayrs and François Bastien.

Appearances:

Messrs. Raymond Larkin and David Roberts, for the Canadian Union of Postal Workers and Gordon Moulton and Roger Lewis; and

Messrs. John B. West and Thomas E.F. Brady, for Canada Post Corporation.

These reasons for decision were written by Vice-Chairman Eberlee.

I

The Board had before it two complaints in which it was alleged that certain employees of Canada Post Corporation (CPC) had been disciplined, and others dismissed, contrary to section 94(3)(a)(vi) of the Canada Labour Code (Part I - Industrial Relations), because of their involvement in legal strike activities, which occurred during October, 1991, while the Corporation and the Canadian Union of Postal Workers (CUPW) were working with a mediator to find agreement on a new collective agreement. A hearing was held in Halifax on January 7, 1992.

II

The Canadian Union of Postal Workers and Canada Post Corporation were parties to several collective agreements covering employees in various operations in Canada Post which carried expiration dates of July 31, 1989. Efforts were made, over two years, through direct negotiations between the parties, and by way of conciliation under the auspices of Labour Canada and a conciliation board appointed by the Minister of Labour, but these failed to produce a renewal of the expired collective agreements. These agreements continued to be in effect until August 24, 1991 when, with the final exhaustion of the dispute resolution procedures established under the Code, the parties became free legally to strike or to lock out, as the case might be.

Canada Post continued to operate, but the Canadian Union of Postal Workers began to exercise its right to strike via various kinds of stoppages and disruptions at different times and locations across Canada. This activity failed to achieve anything particularly discernible, except that both parties accepted the appointment of one of Canada's most renowned and effective mediators, Chief Justice Honourable Alan B. Gold of the Superior Court of Quebec, to assist them in making new collective agreements.

In order to facilitate the mediation process, the union, CUPW, and the employer, CPC, signed on September 7, 1991 what they characterized as a "Memorandum of Agreement." Its four short paragraphs were as follows:

"1. In order to facilitate the mediation process and until further notice, Canada Post Corporation agrees not to declare or cause a lock-out and the Canadian Union of

Postal Workers agrees not to declare or authorize a strike.

2. As of 3:00 p.m. September 5, 1991, the terms and conditions of the collective agreements that were in force between the parties prior to August 24, 1991, shall continue to apply until the conclusion of a new collective agreement or until the giving of a notice under paragraph 3. For greater clarity it is understood that the collective agreements were not effective from 00:00 hrs August 24, 1991 to September 5, 1991 3:00 hrs p.m.

3. Upon written notice given at least twenty-four hours in advance by either party, this agreement shall cease to have effect.

4. Notwithstanding the above, any discipline imposed between 3:00 p.m. September 5, 1991, and the return to work of employees on September 5 or 6, 1991, shall not be invalidated for the sole reason that the procedural requirement imposed by either collective agreement were not complied with."

According to the report of the Board's investigating officer in File 745-4044, the facts outlined in which report were not challenged by the parties:

"On September 9, 1991, without the consent of CUPW, Canada Post restructured certain walks for letter carriers working out of the Dartmouth Main Post Office in Dartmouth, Nova Scotia. As a result, a number of members of the bargaining unit working at and from the Dartmouth Main Post Office resumed the strike. Some of the employees picketed outside while others staged a 'sit in' inside the building in the employees' lunchroom. The work stoppage lasted four (4) days. Canada Post reacted by suspending each of the employees involved for a period of five (5) days. ... CUPW has grieved the suspensions. ..."

The officer's report contains what purports to be a sample of the grievance filed by CUPW on October 15, 1991 in respect of the suspension meted out to each of the employees involved. The "Statement of Grievance" reads as follows:

"The Union grieves on behalf of that the employer has violated the provisions of the LCUC collective agreement and in particular articles 9 and all other related articles. By letter dated September 9, 1991 from Robin Smith, Manager Collection & Delivery they were disciplined in the form of a five (5) day suspension without just, reasonable and sufficient cause.

Further this action contravenes section 94 of the Canada Labour Code."

For the purposes of these reasons, it is sufficient to note that the employees affected by the suspensions were named in Schedule "A" attached to the complaint in file 745-4044, which was delivered to the Board on October 11, 1991. Two others affected were mentioned in a letter to the Board dated December 20, 1991 from CUPW's counsel.

That complaint alleged that, notwithstanding the Memorandum of Agreement signed by the parties, which included the commitment by CPC not to "declare or cause" a lockout and the curiously asymmetrical commitment by CUPW not to "declare or authorize" a strike, the suspendees from Dartmouth Post Office were in a legal strike position and were simply engaging in a lawful strike - and that Canada Post, by penalizing them for their conduct, had violated section 94(3)(a)(vi) of the Code, which reads as follows:

"94.(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

...

(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part; ..."

In other words, according to CUPW, the employer breached the Code for suspending these people for participating in a strike that was not prohibited by the Code - although the parties themselves had clearly agreed to try to prohibit strikes or lockouts while the mediation process was ongoing.

The second file - 745-4055 - sets out a complaint that is somewhat similar in nature. Again according to the investigating officer's report, which has not itself been contradicted by any of the parties, what prompted the problem before the Board was the following:

"On October 11, 1991, a work stoppage by CUPW members took place at Canada Post's Mail Processing Plant in Halifax, Nova Scotia. All who participated were disciplined by Canada Post. Fifty-five (55) employees were given five (5) day suspensions each for their participation and the two (2) complainants [Messrs. Gordon Moulton and Roger Lewis] were fired by Canada Post for their '... participation and leadership role ...' in the walkout. ... CUPW has grieved the firing of Messrs. Moulton and Lewis. ..."

In the complaint to the Board, filed on October 23, 1991, Messrs. Moulton and Lewis alleged that they were discharged by Canada Post because they participated in a strike that was not prohibited by the Code and that Canada Post's action violated section 94(3)(a)(vi) of the Code. The complainants asked the Board to order Canada Post to reinstate them to their former employment and to pay them all wages and benefits lost and to prescribe other remedies, as well.

The grievances filed by CUPW on behalf of Messrs. Moulton and Lewis are similar in form and substance:

"The Union grieves on behalf of ... that the employer has violated article 10 and all other related provisions of the collective agreement. That by letter dated October 20, 1991, ... was discharged with [sic] his employment with Canada Post without just, reasonable and sufficient cause. This action is also contrary to article 94 of the Canada Labour Code."

The Board was advised that the foregoing grievances of Messrs. Moulton and Lewis are scheduled to be heard by an arbitrator on February 25, 1992.

III

As has been indicated earlier, the union took the position that the Memorandum of Agreement, which has been quoted on page 2 and which was applied to the relationship between the parties after September 5, 1991, was only an interim arrangement to facilitate the mediation process; it did not create a collective agreement within the meaning of the Code, although it did apply, or reapply, for the period it was in effect, the terms and conditions of the collective agreements that had run out on August 24, 1991. Counsel for CUPW argued that in spite of the agreement that CPC would not "declare or cause a lock-out" and CUPW would not "declare or authorize a strike," the arrangement did not remove from CUPW and its members the "right to strike" which had been acquired under the Code on August 24, 1991. Counsel cited numerous cases to support his contention.

Canada Post took the opposite tack - that, as a result of entering into the arrangement, the parties did in fact create a collective agreement, within the meaning of the Code, the existence of which, as the Code implies, if it does not directly provide, renders any strike or lockout

activity after September 5, 1991 to be contrary to the Code.

On balance, the Board tends to the belief that the arrangement did not create a collective agreement as such at the time. This view is based upon what we think can reasonably be considered the intentions of the parties who signed the Memorandum of Agreement. We cannot believe that CUPW intended this to be a collective agreement. For, undoubtedly CUPW's leadership was well aware that under the Code a collective agreement with no provision as to its term or with a specified term of less than one year shall be deemed to be for a term of one year (section 67(1)). CUPW cannot have intended to run the risk that it would be locking itself into the old pre-August 24, 1991 collective agreement until September 4, 1992, with perhaps another year or two of negotiation and conciliation added to that before it could regain any right to strike (section 89).

Moreover, we cannot believe that Canada Post intended this to be a collective agreement. If it did, how could that be viewed as other than an exercise of bad faith; we trust the Crown corporation would never engage in something like that. We have no doubt, when both signed the document, that Canada Post would certainly have realized full well what the implication would be in future for CUPW if the thing were deemed to be a collective agreement.

Both obviously contemplated the termination of the arrangement on 24 hours' notice because they wrote that into the memorandum. And both would have known that a collective agreement within the meaning of the Code cannot be terminated on that kind of bilateral basis. (Again, see sections 67(1) and (2).)

All that having been said, however, the arrangement agreed to by the parties did contemplate in the clearest terms, whatever the non-symmetry of the respective commitments, that no strikes or lock-outs would disrupt the situation while the arrangement continued in force. There was a moral, if not a legal commitment by the parties not to strike or lock-out. And yet the disruptions that led to the suspensions and dismissals and complaints in files 745-4044 and 745-4055 did occur.

The Board was told by counsel for CUPW that the union's hands were clean; it had nothing to do with those disruptions; the strikes that occurred were unauthorized and spontaneous, unplanned and undeclared by CUPW. We have no reason to doubt him. Moreover, the written fact submissions of the parties and the report of the Board's investigating officer lead us to conclude that these disruptions in fact had little or nothing at all to do with the making of a new collective agreement, which was the general and prime purpose of the right to strike that was acquired by the union as of August 24, 1991. The 40 or so letter carriers involved in file 745-4044 "withdrew their services because of a dispute with Canada Post over the re-organization of letter carrier routes", according to page 2 of the union's "Brief on Behalf of the Complainants" which was presented to the Board and referred to by the union's counsel during the January 7, 1992 hearing. It is hard to believe that an issue like this - which probably could have been resolved in a far more rational way under the terms of the Memorandum of Agreement, - had anything to do with what was on the bargaining table during the then ongoing mediation process.

Similarly Mr. Moulton was said by the union in the same "Brief on Behalf of the Complainants" to have become involved with management of CPC in a dispute over safety conditions at the postal station. He was suspended. Mail handlers then walked out and held a "sit in." And in the end Messrs. Moulton and Lewis were discharged because of their "participation and leadership role" in the disruption. It is impossible to believe that the dispute at the core of this affair could not have been resolved under an alternative rational process without CUPW having been exposed by some of its own members to an incidental and localized violation of its no-strike commitment during the mediation process. This matter, too, as an issue prompting strike action, seems to have had little connection with the main question underlying CUPW's exercise of the right to strike after August 24, 1991.

The situation before the Board in these complaints is, no doubt, a highly unusual one that will probably never recur. Thus, it is unlikely that this Board will face the expectation on many further occasions that it should find any freelance local work disruptions like these - which only demonstrate the inability of the union involved to honour a commitment and to control some of its members - to be a strike for the purposes of section 94(3)(a)(vi) of the Code.

In this case, it is very difficult to see these occurrences, as they have been described by the union in its own submissions, as strikes such as are contemplated under that section. If, on the other hand, each of the incidents in files 745-4044 and 745-4055 was "a strike that is not prohibited" by the Code, and Canada Post has violated section 94(3)(a)(vi) - which we are not finding here - then the violation would have to be characterized

as basically technical in character; moreover, because those who had engaged in the "strike" activity had in fact broken the CUPW no-strike commitment, we would not feel bound to grant them any remedy of the kind sought in these complaints. In the final analysis, there is no sound labour relations purpose which would be served by the Board undertaking to adjudicate the substance of these complaints nor is there a genuine statutory right that the Board must define or reassert.

IV

In this Board's opinion, the appropriate industrial relations solution to the problem posed by these complaints is for the Board to invoke section 98(3) of the Code:

"98.(3) The Board may refuse to hear and determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board."

When it invokes section 98(3) and defers a matter to arbitration, the Board first looks to make sure that there was in fact a collective agreement in effect covering the period when the alleged violation of the agreement occurred. Parliament, in late October, made sure that there was no doubt about the existence of a collective agreement during that time period. In the Postal Services Continuation Act, 1991 Parliament provided that collective agreements entered into between CUPW and Canada Post and the Letter Carriers Union of Canada, both of which expired on July 31, 1989, were effective and binding, among other times, after 3:00 p.m. E.D.T. on September 5, 1991,

throughout the period covered by the "Memorandum of Agreement" and thereafter until a new amalgamated collective agreement would come into operation. The Board finds, therefore, that there exists a collective agreement pursuant to which the matters contained in the grievances quoted on pages four and six could be referred to arbitration. Those collective agreements afford full scope to an arbitrator to hear and determine the grievances expeditiously. As has been indicated, the Moulton and Lewis dismissals are already slated to be heard by an arbitrator on February 25, 1992 and the suspension grievances are supposed to receive expedited treatment.

The real dispute here is over the discipline - suspensions and firings - meted out by Canada Post to the individuals on whose behalf the complaints in Files 745-4044 and 745-4055 have been made. The real question at issue here in each instance is whether the provisions of the applicable collective agreements have been violated and whether the penalties given to the persons involved were without just, reasonable and sufficient cause.

In the Board's opinion the real issues in these matters do not go beyond the scope of the applicable collective agreements. There are no issues of public policy under the Code which are raised by these complaints and which require rulings by the Board. The proposition that section 94(3)(a)(vi) may have been violated is not, under these circumstances, a sufficient public policy issue to justify our failing to give the arbitration process the dispute-resolution priority that it deserves.

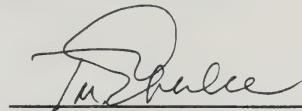
Over many years and in numerous cases, the Board has developed, explained and set out the criteria for invoking

or not invoking section 98(3). Please see: Bell Canada (1977), 20 di 356; [1978] 1 Can LRBR 1; and 78 CLLC 16,126 (CLRB no. 97); Bank of Montreal (Devonshire Mall Branch) (1982), 51 di 160; and 83 CLLC 16,015 (CLRB no. 404); Canada Post Corporation (1983), 52 di 106; and 83 CLLC 16,047 (CLRB no. 426); Canada Post Corporation (1987), 69 di 91 (CLRB no. 620); Canada Post Corporation (1987), 71 di 177 (CLRB no. 652); Wardair Canada Inc. (1988), 76 di 123; and 89 CLLC 16,009 (CLRB no. 722); Canada Post Corporation (1989), 76 di 212 (CLRB no. 729); Canada Post Corporation (1990), as yet unreported CLRB decision no. 800; Ottawa-Carleton Regional Transit Commission (1990), as yet unreported CLRB decision no. 805; Québecair (1990), as yet unreported CLRB decision no. 827.

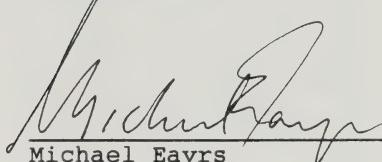
Having applied here all of the relevant criteria established via Board jurisprudence, we are satisfied that the proper disposition of these complaints, for all concerned, is to refuse to hear and determine them because they can more appropriately be referred pursuant to a collective agreement to an arbitrator or arbitration board. Files 745-4044 and 745-4055 are closed.

The Board is also seized with similar complaints in the following files involving Canada Post Corporation, the Canadian Union of Postal Workers and employees of Canada Post: 745-4045, 745-4049, 745-4075, 745-4085, 745-4091, 745-4116, 745-4128, 745-4130, 745-4139, 745-4146 and 745-4153.

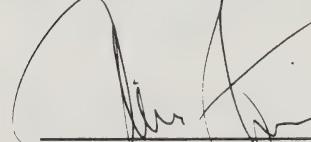
The Board hereby gives notice to the parties that it proposes to invoke section 98(3) in respect of these complaints. Should any party wish to make representations to the contrary, the Board will receive written submissions until one month after the date of these reasons for decision and then will take action in the light of those submissions.



Thomas M. Eberlee
Vice-Chairman



Michael Eayrs
Member of the Board



François Bastien
Member of the Board

ISSUED at Ottawa, this 31st day of January, 1992.

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Summary

R. BOIVIN AND CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS, COMPLAINANT, BRINK'S CANADA LIMITED, EMPLOYER, AND J. PAQUET-SIOUI, SAFETY OFFICER.

Board File: 950-216

Decision No.: 916

This case deals with a reference to the Board, pursuant to section 129(5) of the Code, of a decision rendered by safety officer Mrs. J. Paquet-Siou. This reference was requested by Mr. Richard Boivin, an employee of Brink's Canada Limited. Mr. Boivin is asking the Board to review the decision of safety officer Paquet-Siou, who concluded that his refusal to work at the National Bank in Hawkesbury, on November 13, 1991, was not justified, because there was not a danger which was not inherent to Mr. Boivin's job.

The Board concludes, after having analyzed the jurisprudence, that the first question the Board must answer is the following: did there exist, at the time of the investigation, a condition that constituted a danger to the employee?

If there was a danger, before issuing a direction, however, the Board must determine whether there was still a danger at the time of the inquiry.

The Board disagrees with the employer that the onus, in case of a reference, must be on the employee.

The Board makes a comparison between what it calls a "danger" and the employer's duty to ensure the safety at work of all its employees, as stipulated in section 124.

The Board confirms the safety officer's decision.

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Résumé de Décision

R. BOIVIN ET FRATERNITÉ CANADIENNE DES CHEMINOTS ET EMPLOYÉS DES TRANSPORTS, PLAINTANT, BRINK'S CANADA LIMITED, EMPLOYEUR, ET J. PAQUET-SIOUI, AGENT DE SÉCURITÉ.

Dossier du Conseil: 950-216

Décision n° 916

La présente affaire porte sur le renvoi au Conseil, aux termes du paragraphe 129(5) du Code, d'une décision rendue par l'agent de sécurité, Mme J. Paquet-Siou. Ce renvoi fait suite à la demande de M. Richard Boivin, un employé de Brink's Canada Limited. M. Boivin demande au Conseil de réviser la décision de l'agent de sécurité Paquet-Siou, qui concluait que son refus de travailler à la Banque Nationale de Hawkesbury, le 13 novembre 1991, n'était pas justifié, parce qu'il n'y avait pas un danger non inhérent au travail de M. Boivin.

Le Conseil conclut, après l'analyse de la jurisprudence, que la première question à laquelle doit répondre le Conseil est la suivante: existait-il, au moment de l'enquête, une situation qui constituait un danger pour l'employé?

S'il y avait danger, avant de donner des instructions, le Conseil doit déterminer si le danger existait toujours au moment de l'enquête.

Le Conseil n'est pas d'accord avec l'employeur qui prétend que l'employé doit assumer le fardeau de la preuve lorsqu'il y a renvoi.

Le Conseil fait une comparaison entre ce qu'il appelle un «danger» et l'obligation de l'employeur de veiller à la protection de ses employés en matière de sécurité et de santé au travail, en conformité avec l'article 124.

Le Conseil confirme la décision de l'agent de sécurité.



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Reasons for Decision

R. Boivin and Canadian
Brotherhood of Railway,
Transport and General
Workers,

complainant,

and

Brink's Canada Limited,
Hawkesbury, Ontario,

employer,

and

J. Paquet-Sioui,

safety officer.

Board File: 950-216

The Board was composed of Mr. J. Jacques Alary, Member,
sitting as a single member panel, pursuant to section 156
of the Canada Labour Code (Part II - Occupational Safety
and Health).

APPEARANCES:

Mr. George Vassos, for the employer;

Mr. A. Wepruk, for the complainant;

Mrs. J. Paquet-Sioui, on her own behalf.

I

This case deals with a reference to the Board, pursuant
to section 129(5) of the Code, of a decision rendered by
safety officer J. Paquet-Sioui. This reference was
requested by Mr. Richard Boivin, an employee of Brink's
Canada Limited (Brinks). Mr. Boivin is asking the Board
to review the decision of safety officer Paquet-Sioui,
who concluded that his refusal to work at the National
Bank in Hawkesbury, on November 13, 1991, was not
justified because of the following reasons:

"1. There was a definite break in

communication, but there was no evidence that communication was not possible.

2. The communications measures appear to be satisfactory.

3. The two-radio system worked properly throughout the run inside and outside the banks before the stop at the National Bank in Hawkesbury.

4. The employer's procedures for dealing with incidents are safe; the messenger must:

- drop the valuables
- obey orders
- not shoot
- not use his weapon unless he feels he is in danger
- the weapon he carries is a deterrent.

A messenger cannot enter a vault unless he is accompanied by an employee of the bank, who is not armed.

5. At the National Bank in Hawkesbury, when a messenger enters the vault, the door is closed and locked until the messenger has completed his transaction at the bottom of the stairs.

6. The messenger says he feels he is in danger if he cannot see the guard when he comes out of the vault. If there had been a robbery, it is reasonable to believe that had there been a guard, the guard would have been immobilized first. The messenger could not have been warned by the guard while he was in the vault. And in this case, the driver would not have been able to see a robber waiting for the messenger at the top of the stairs.

In both cases, the messenger would have been coming up with a trolley containing the valuables and would have come face to face with the robber. He would have had to drop the valuables and would not have been able to use his weapon.

However, it is also reasonable to believe that the driver would have been able to see that the situation was becoming dangerous and could have reached the messenger with the walkie-talkie. Consequently, the guard would not have been able to warn him of any danger.

7. Sergeant Maurice Durocher of the Hawkesbury Police told me that he read the letter from Brinks but said the police have no special assignment for this or any other company.

8. On November 13, 1991, because of road work being done on Main Street two blocks from the National Bank, eastbound traffic was moving at a crawl or was stop and go.

Westbound traffic was slow.

Generally, even without road work, traffic on Main Street is slow.

The door to the bank is on the corner of the sidewalk and the entrance to the bank's parking lot.

Behind the bank's parking lot is a field stretching toward the Ottawa River.

Consequently, it would have been virtually unthinkable for anyone to try to rob this bank on 13.11.91 because a quick escape was impossible, according to Sergeant Durocher."

A hearing was held in Ottawa on January 10 and 24, 1992.

II

THE CIRCUMSTANCES

Mr. Richard Boivin has worked for Brinks, as a messenger, for approximately two years. The main duty of a messenger is to sign receipts for all shipments and to use the facilities provided for the safekeeping and security of all shipments. He exercises immediate supervision over the armoured car crew while on scheduled runs; he sees that the crew members perform their duties in a proper manner with particular regard to security and efficiency. He operates from the rear compartment of the vehicle when working in a two-compartment truck, as was the case here. He has full responsibility for shipments and he is the one who makes the pick-up or the delivery. The messenger's duties are described in Exhibit No. 8, a booklet entitled "Employees Handbook."

On November 12, when Mr. Boivin came back from Toronto, around 10:00 p.m., he received his assignment for the next morning (the Hawkesbury run) and was advised that a two-man crew rather than a three-man crew would be used. Even though he did question this procedure, he decided

not to discuss it with management, but to go home and phone Mr. Kingsbury who was assigned as driver on the same run. They spoke on the phone, and Mr. Kingsbury informed Mr. Boivin that he would hand him a report prepared by Mr. Jacques Robert of Labour Canada following a refusal by a Brinks employee to work on the two-man crew. Mr. Kingsbury also told him that he would explain the procedure on how to exercise his right to refuse under the Code.

On the morning of the 13th, Mr. Boivin went to work. Mr. Gaétan Sénéchal, the fleet supervisor, instructed him on how to operate a walkie-talkie radio that was to be used in addition to the regular two-way radio. Messrs. Kingsbury and Boivin left the terminal with the Brinks truck and were followed by Mr. Jacques Delorme, General Manager, and Mr. Gaétan Sénéchal, who was wearing the uniform and a gun. Those two were travelling in a non-marked car. They drove to St-Eugène to serve the first client and then went to Vankleek Hill and finally arrived in Hawkesbury. During those three first stops, Mr. Sénéchal accompanied Mr. Boivin and tested the walkie-talkie. The radio was working with minor interference, which was fixed by shutting off the Johnson radio, to give full power to the walkie-talkie. At the fourth stop (Bank of Montreal), Mr. Sénéchal informed Mr. Boivin that he would not accompany him. Mr. Boivin refused to carry out the assignment and, as a result, Mr. Delorme asked Mr. Sénéchal to accompany Mr. Boivin in the bank. At the fifth stop, the National Bank of Hawkesbury, the driver, Mr. Kingsbury, also a member of the Health and Safety Committee, parked the truck in front of the bank. Mr. Delorme parked his car in the parking lot facing the truck. Mr. Boivin was informed that Mr. Sénéchal would not carry out that delivery with him. Mr. Boivin entered

the bank, made a quick tour, asked where the vault was, walked out of the bank and went back to the truck. At that time, he walked to Mr. Delorme's car informed him that he would not make the delivery if Mr. Sénéchal did not accompany him. Mr. Delorme then informed Mr. Boivin that he would call Labour Canada to have an officer investigate his refusal. In the meantime, Mr. Sénéchal accompanied Mr. Boivin and both served the National Bank.

Mrs. Paquet-Siou, the investigating officer, arrived at the National Bank. She questioned individually Mr. Delorme, Mr. Kingsbury, who acted as the Safety and Health Committee's representative, and Mr. Boivin. She took pictures and asked Mr. Boivin the reason for his refusal. Mr. Boivin gave the same answer he had given to Mr. Delorme: the driver did not have a constant visual contact with him. She asked Mr. Boivin if he had something to add.

He gave her two other reasons:

- the Hawkesbury police were not informed that Brinks was in the area, and
- there was no spare two-way radio.

She drove back to Ottawa and completed her investigation. On November 14, 1991, she rendered her decision based on her investigation, Mr. Jacques Robert's report, Brinks' reaction to that report, her interpretation of the right to refuse, a letter from Brinks to the Hawkesbury police, a conversation with the Hawkesbury police who informed her that they were not told when a Brinks truck was in town and that they had seen the truck sitting there for an hour; however, they did not check if anything was

wrong, because Brinks is supposed to know what to do.

It is not the first refusal to work by a Brinks employee on a two-man crew. On April 3, 1991, Mr. Jacques Robert of Labour Canada had to investigate one case at the National Bank in Vankleek Hill. There was also one at the Bank of Montreal in Hawkesbury. After the investigation, Mr. Robert told the parties that if Brinks enforced the 11 points appended to his report, he would not disagree with the use of a two-man crew for the Hawkesbury run only. We reproduce here those eleven points:

- "1) The usage of batteries beyond their life expectancy.
- 2) Constant malfunction on the one-way radio communication.
- 3) Several radios given to a mobile unit due to frequent brake-downs of the radio.

(Items 1, 2 and 3 need standard operational policies from H.Q.)

- 4) Present policy concerning the movement of the vehicle while the messenger is away, needs to be revised on matters concerning safety and security.
- 5) The exchange of funds to be done in a safe and secure area, cancels the over the counter exchange policy. No contracts detailing where the exchange should take place was ever provided.
- 6) The driver does not always observe his counterpart (Messenger) in the bank.
- 7) More attention is needed on details concerning medium size banks.
- 8) To eliminate undue stress that distracts the Driver and the Messengers from their functions.
- 9) Must establish liaisons with local police authorities when the vehicles are in their sphere of control, apparently none exists at this time. (This liaison would be welcome by the Police)
- 10) Make better use of JOSHC (Joint Occupational Safety and Health Committee).
- 11) To [sic] much time was lost due to the debates on new policy #7, at the locations."

On July 25, 1991, Mr. Neil Dryson, President of Brinks, sent a letter to Mr. Jacques Robert concerning compliance with the 11 points. The only point Brinks did not approve of was the walkie-talkie, but after a few tests, it decided to buy new ones, which arrived during the week before November 13. Brinks then asked a member of the Health and Safety Committee to test them. That member confirmed that the equipment was in proper working order. Before the Hawkesbury run, Mr. Delorme phoned Mr. Robert at Labour Canada. Since Mr. Robert was on vacation, he talked to his boss, Mr. Potvin, and informed him that the company intended to use a two-man crew on the Hawkesbury run on the 13th. He told Mr. Potvin that the radios had been tested by a member of the Health and Safety Committee who was satisfied. Mr. Potvin told him he did not see any problem and if there were some, to call him.

The union did not agree with the conclusion in Mr. Robert's report following the April refusal, and asked Mr. Robert to refer his decision to this Board (Board File 950-192). The Board concluded:

"The Safety Officer's report is not clear and it was only when he testified that the report was clarified and that it was revealed that in some circumstances the implementation of a two-man crew constituted a danger.

Mr. Robert also testified that should one of the recommendations contained in his report not be met by Brinks Canada Ltd., that he would issue a report.

This left the Board in an ambiguous situation: was there a report to refer to the Board or not? Through all his testimony, Mr. Robert led us to believe that his report was a series of recommendations for the parties to use for their negotiations on this safety issue.

Having reviewed the file thoroughly and after hearing the Safety Officer's testimony, the Board finds that the investigation of the

Safety Officer, Mr. Robert, revealed that a two-man crew constituted a danger in some circumstances, the referral was found to be inadmissible and the Board's file was closed."

Mr. Robert's report was not reviewed by the Board or the regional officer. The two-man crew has been discussed at Health and Safety Committee meetings, but no conclusion was ever reached on the safety of using a two-man crew instead of a three-man crew. There were also fears expressed by some employees regarding possible lay-offs because of the use of two-man crews. Mr. Delorme told the Board that he had spoken with Mr. Wepruk, the union representative, who informed him that if he went along with the two-man crew procedure, he would have to deal with refusals to work by the messengers.

It was also mentioned that the collective agreement allows for the use of two-man crews, and the Employees Handbook contains a provision on that subject. Mr. Delorme told the Board that during his 30 years of service at Brinks, he had on several occasions, at the beginning of his career, worked on a two-man crew.

III

ARGUMENT

Mr. Boivin's representative argued:

- Mr. Boivin was afraid to work on a two-man crew because he had never done so in the two years he had worked for Brinks.
- Up to his refusal, this run was always done with a three-man crew.

- Mrs. Paquet-Sioui had no experience in this field of expertise.
- Mrs. Paquet-Sioui had no degree in criminology and had not consulted any study prepared by a specialist or reviewed any other case.
- She never tested the radio.
- Mr. Robert argued that no three-man crews would be used until he gave his consent.
- The fact that no guard accompanies the messengers increases the possibility of assault with a weapon, other than a gun.
- The explanation given by the Hawkesbury police regarding the possibility of robbery and getaway is not serious.
- Brinks did not inform the Hawkesbury police of the proper procedure.
- The union did not agree with the conclusion in Mr. Robert's report because Mr. Robert did not carry out extensive research on the subject, and the report is not supported by expert study.
- The possibilities of robbery in a small town are about the same as in a city.
- It is easier to attack a two-man crew than a three-man crew.

- A radio cannot replace a guard, nor can it give first aid.
- A safety feature cannot replace a guard.
- The driver, even though he can see the messenger, cannot leave the truck at any time.
- The fact that there is no visual contact between the driver and the messenger constituted a danger not inherent to Mr. Boivin's work.
- The only reason why Brinks uses a two-man crew is financially motivated, not safety-related.

Mr. Boivin asked the Board to stay the decision on the use of two-man crews until Labour Canada has carried out a serious study.

Mr. Vassos, on behalf of the employer, argued:

- The Board must first of all act as an appeal body and put the onus on Mr. Boivin and not adopt the Chairman's position mentioned in decision H.D. Snook (1991), as yet unreported CLRB decision no. 895.
- Mr. Boivin had not discharged the onus to demonstrate that the safety officer's decision was wrong.
- The question the Board must ask itself is whether on November 13, 1991 Mr. Boivin, upon

his refusal, had reasonable cause to believe that danger existed. The response is no.

- The Board's mandate in a referral case is limited to what happened on a particular day, at a particular time, in a particular place.
- The walkie-talkie was working properly during the first stops, and the Health and Safety Committee was satisfied with said radio.
- The arguments presented by Mr. Boivin are not relevant to the case.
- The danger feared by Mr. Boivin was inherent to his job.
- When Mr. Boivin was hired, he was advised of the risks of the job.
- The refusal was initiated by the union and Mr. Delorme was expecting it.
- Here, we speak about possibilities. There was no proof that on November 13 there were suspects near the bank.
- The fact that Messrs. Delorme and Sénéchal were near the truck would minimize the risk, if there was any.
- Brinks has responded to all elements which were

found in Mr. Robert's report; there was nothing unusual in or outside the bank on that particular day.

- The procedure on the use of two-man crews is found in the Employees Handbook.
- A good communications system can easily replace a guard.
- Mr. Delorme worked on a two-man crew and had never had any problem.
- The other two reasons given by Mr. Boivin other than the fact the driver had no visual contact with him were given after the fact and were never mentioned to Mr. Delorme.
- Brinks is not in the habit of advising the police whenever it comes to town.
- No evidence shows that there was a danger for Mr. Boivin to work on that particular day, which was not inherent to his work.

III

Where a safety officer decides that there is no danger, an employee can require, under section 129(5) of the Code, that the safety officer refer his decision to the Board.

"129.(5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or

operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."

The role of the Board is described in section 130(1):

"130.(1) Where a decision of a safety officer is referred to the Board pursuant to subsection 129(5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision and the reasons therefor and may

- (a) confirm the decision; or
- (b) give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145(2)."

The Code provides that the Board can only get involved when the safety officer renders a no-danger decision. In the case of directions issued by a safety officer:

"146.(1) Any employer, employee or trade union that considers himself or itself aggrieved by any direction issued by a safety officer may ... request that the direction be reviewed by a regional safety officer..."

The Code empowers the regional safety officer to review directions issued by a safety officer under this Part and the Board to review a no-danger decision of a safety officer, relating to a place, machine or thing.

"146.(3) The regional safety officer shall in a summary way inquire into the circumstances of the direction to be reviewed and the need therefor and may vary, rescind or confirm the direction and thereupon shall in writing notify the employee, employer or trade union concerned of the decision taken."

The Board, pursuant to section 130(1), may confirm the decision or give any appropriate direction that the safety officer should have given under section 145(2). We may conclude that the approach is about the same for the Board and the regional safety officer.

The role of the safety officer is to investigate the matter in the presence of the employer and the employee or the employee's representative. On the completion of an investigation, the officer decides whether or not there is a danger.

"129.(1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the employer and the employee shall each forthwith notify a safety officer, and the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee or the employee's representative.

(2) A safety officer shall, on completion of an investigation made pursuant to subsection (1), decide whether or not

(a) the use or operation of the machine or thing in respect of which the investigation was made constitutes a danger to any employee, or

(b) a condition exists in the place in respect of which the investigation was made that constitutes a danger to the employee referred to in subsection (1),

and he shall forthwith notify the employer and the employee of his decision."

The Federal Court of Appeal in Attorney General of Canada v. Vincent Bonfa et al., file no. A-138-89, December 18, 1989, reviewed a decision issued by a regional safety officer pursuant to section 146 of the Code. In that decision, Pratte, J.A., expressed the following view:

"Where an employee accordingly refuses to work in a place, he must inform his employer of this and the latter must investigate

immediately. If the employer does not then give the employee any satisfaction, s. 128(8) states that the latter may continue to refuse to work. Here it is useful to cite the English and French texts of this subsection, noting the words which I have underlined:

'128. (8) Where an employer disputes a report made to the employer by an employee pursuant to subsection (6) or takes steps to make ... the place in respect of which the report was made safe, and the employee has reasonable cause to believe that

...

(b) a condition continues to exist in the place that constitutes a danger to the employee,

the employee may continue to refuse ... to work in that place.

128.(8) Si l'employeur conteste le rapport de l'employé ou s'il prend des mesures pour éliminer le danger, l'employé peut maintenir son refus ... de travailler dans le lieu en cause s'il a des motifs raisonnables de croire:

...

(b) ... qu'il continue d'y avoir danger pour lui à travailler dans le lieu.'

Accordingly, it is only if an employee has reasonable cause to believe that the danger feared still exists that the employee may persist in his refusal to work after the employer has investigated. It is possible that after the investigation the employer has eliminated the danger; it is also possible that the dangerous situation was only temporary and disappeared of itself. Further, the English wording of s. 128(8) makes it clear that the employee's complaint in this case is that his workplace is not safe.

If an employee persists in his refusal to work, reference is made under s. 129 to a safety officer, who must investigate forthwith and decide 'whether or not ... a condition exists in the place in respect of which the investigation was made that constitutes a danger to the employee'. The function of the safety officer is not to decide whether the employee was right in refusing to work in his workplace but whether, at the time the officer did his investigation, a condition existed in the workplace that constituted a danger to the employee. If the officer concludes that there was a danger, he must give the direction he considers appropriate under s. 145(2). If the officer considers that no danger exists, his decision may be appealed to the Canada Labour Relations Board, and

then s. 130(1) states that the Board, after 'inquir[ing] into the circumstances of the decision and the reasons therefor', may:

- '(a) confirm the decision; or
- (b) give any direction that it considers appropriate in respect of the ... place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145(2).'

The direction to be given must therefore be a direction concerning the workplace.

Under s. 129(4), after the direction has been given by the safety officer or the Board,

'... an employee may continue to refuse to ... work in that place until the direction is complied with or until it is varied or rescinded under this Part.'

In my opinion, all these provisions clearly indicate that s. 128(1)(b) authorizes the employee to refuse to work in a place because of the dangers it presents and that the function of the safety officer is solely to determine whether, at the time he does his investigation, that place presented such dangers that employees were justified in not working there.

In the case at bar the danger feared by the respondent when he refused to perform the task assigned to him on September 22, 1988 was not in any way connected with his workplace. Additionally, the danger did not exist at the time the safety officer did his investigation, since at that time Kwateng had already been taken to the hospital, where as we learn from the subject decision it was found that he was not suffering from the disease which the respondent believed he had.

The regional safety officer affirmed the direction given by the safety officer because he considered first, as the safety officer had done before him, whether the respondent was right in refusing to obey his superior's orders on September 22. He did so as well because he was of the view that the respondent's employer had not complied with all the provisions of Part II of the Code regarding employers' duties to their employees. These considerations were unrelated to the questions which the regional officer had to answer, and in particular to the first of these questions as to whether at the time the safety officer did his investigation the respondent's workplace presented such dangers that employees were justified in not working there until the situation was corrected. The fact that before the safety officer did his investigation the respondent may have had legitimate grounds for refusing to do the work assigned to him cannot affect the answer to be given to this

question; and the fact that under s. 145(1) the safety officer could have found that the employer was in breach of Part II and directed it to terminate this breach was also not germane to the issue, since the safety officer never found such a breach to exist and never gave a direction to the employer under s. 145(1).

If the regional officer had asked himself the question he should have asked, he could only have given it one answer, namely that at the time the safety officer did his investigation the respondent's workplace presented no danger. He should therefore simply have rescinded the direction given by the safety officer."

(pages 5-8; emphasis added)

We reproduce here section 145(1):

"145.(1) Where a safety officer is of the opinion that any provision of this Part is being contravened, the officer may direct the employer or employee concerned to terminate the contravention within such time as the officer may specify and the officer shall, if requested by the employer or employee concerned, confirm the direction in writing if the direction was given orally."

In Bidulka v. Canada (Treasury Board), [1987] 3 F.C. 630, the Federal Court of Appeal examined a decision of the Public Service Staff Relations Board (PSSRB) issued pursuant to section 130 of the Code. The PSSRB is the body to which a safety officer's no-danger finding is referred when an employee in the Public Service exercises the right to refuse. In Bidulka, supra, Mr. Justice Pratte wrote that the task of a safety officer under section 129 of the Code is to "determine whether, at the time of the investigation, a 'condition exists ... that constitutes a danger to the employee' " (page 641).

After having reviewed both the Bonfa and Bidulka decisions, the role of the Board, the role of the safety officer and the role of the regional officer, we conclude that the first question the Board must answer is the

following: did there exist, at the time of the investigation, a condition that constituted a danger to the employee?

To do that, the Board shall, without delay and in a summary way, inquire into the circumstances and reasons for the decision. If the Board concludes that there was no danger at the time of the investigation, then it must confirm the officer's decision.

If the Board concludes that there was a danger, it must then put itself in the shoes of the safety officer and issue any direction that it considers appropriate. The Board's authority under section 145(2) is restricted to issuing a direction to protect against a danger to an employee while at work. The Board does not have the authority, under section 145(1), to issue a direction to put an end to contraventions of Part II of the Code. For example, the Board does not have the authority to issue directions to put an end to a contravention by an employer of section 124, which requires every employer to ensure the protection of the safety and health at work of all its employees. The Board can only issue a direction to protect against a danger in the work place.

Before issuing such a direction, however, the Board must determine whether there is still a danger at the time of its inquiry. Section 130(1) states that the Board may give any direction that it considers appropriate. The Board is not required to give a direction whenever it finds that a danger existed at the time of the safety officer's investigation. It makes no sense for the Board to issue a direction to protect against a danger that does not exist. If the same or a similar danger recurs at a later date, an employee may again exercise his right

to refuse to work until the dangerous situation is resolved. In the meantime, the parties may, through their own health and safety committees, attempt to solve the problem in a more permanent fashion. If the parties are unable to reach an agreement, the health and safety officer is authorized under section 145(1) to issue a direction to put an end to contraventions of the Code. As noted above, all employers have a duty, pursuant to section 124 of the Code, to ensure that the health and safety of their employees, while at work, is protected.

In dealing with this reference, we will follow the steps described above. If we determine that no danger existed at the time of the safety officer's investigation, we will confirm her decision. If we find that the danger did exist, we will then determine whether that danger persists. If the danger no longer exists, no direction will be issued. If the danger persists, an appropriate direction will be issued.

Before proceeding, we wish to review the role of safety officers when they are called upon to investigate refusals.

The officer shall forthwith, on receipt of notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee, or the employee's representative.

"129.(1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the employer and the employee shall each forthwith notify a safety officer, and the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee or the employee's representative."

In Bidulka, supra, the Court said:

"I do not see merit in that argument. The task of a safety officer under paragraph 86(2)(b) is clearly to determine whether, at the time of the investigation, a 'condition exists ... that constitutes a danger to the employer'. The fact that there had been violence on the picket lines a few days before the investigation was clearly not a condition that existed at the time of the investigation of the safety officers. It would, of course, have been relevant to the determination that they had to make if the situation had not changed since those eruptions of violence. But it was precisely because they judged that the situation prevailing at the time of their investigation was different from the one that had existed earlier that the safety officers decided as they did. Because of that change, one could not reasonably anticipate that the future would be a mere repetition of the past. In my view, the Board was therefore right in deciding that the safety officers had approached their investigation in the correct way."

(page 641)

The safety officer must determine if the situation has not changed. The officer carries out an investigation in the presence of the parties before making a determination. That role is limited to what was going on at the time of the investigation. Section 129 does not oblige the safety officer to make an extensive study of the situation, but to decide after having spoken with the parties involved whether there is a danger. It is an expeditious process. During the inquiry, if the officer finds that there is violation of section 124 or of any other provisions, said officer may, as stipulated in section 145(1), issue a direction to put an end to the contravention.

IV

Before analyzing the circumstances, we would like to comment on the view expressed by Brinks on the two positions adopted by the Board when dealing with a reference and the conclusion that it must put the onus on the employee.

Brinks referred the Board to some decisions where the Board expressed its views on section 130 and compared this procedure to an appeal of the safety officer's decision which, according to Brinks is contrary to what was said in H.D. Snook, supra.

"...It was made clear to the parties that the safety officer was not there to 'defend' his decision; that the proceedings were not in the nature of an 'appeal' in any technical sense; and that there was no particular 'onus' on anyone: the Board is, as the Code contemplates, conducting its own inquiry - in a summary way - into the circumstances in which a 'no danger' decision was made."

(page 3)

After having reviewed that decision among others, we do not see any contradiction, because in H.D. Snook, supra, the Board said that "the proceedings are not in the nature of an "appeal" in any technical sense." It does not mean that the Board was wrong when it used the term "appeal" in other decisions to demonstrate the effect of the review carried out by this Board. More importantly, we did not see any reference cases where the Board put the onus on the employee, and we do not see any reason to do. Section 130(1) is clear: the Board shall, in a summary way, inquire into the circumstances and reasons for the decision. That is what we will do.

THE DECISION

As mentioned earlier, the first question the Board must answer is the following: was there at the time of the investigation conducted by Mrs. Paquet-Sioui a condition in the respondent's work place that constituted a danger? If there was one, we will have to determine if the danger is inherent to Mr. Boivin's task. If our conclusion is no to that question, we have to ascertain if a danger not inherent to the job still exists. If our finding is yes, we will issue the proper instructions. To do so, we have to review the circumstances and the reasons for the decision.

The definition of "danger" was explained in many Board decisions. In David Pratt (1988), 73 di 218; and 1 CLRBR (2d) 310 (CLRB no. 686), the Board reviewed the interpretation of danger after the Code was amended and the word "imminent" was deleted from the former definition of "danger." The term referred to the risk that is inherent to employees' work or normal conditions of employment.

At Brinks, the risk of robbery or assault is part of Brinks employees' lives. For this reason, Brinks issued the Employees Handbook explaining to the employees how to deal with that risk and providing them with means to discourage criminals from attacking the crew or the premises. This aspect was not contradicted by anyone in these proceedings. According to Mr. Boivin, the fact that Brinks decides to use a two-man crew instead of a three-man crew increases the risk of assault or robbery and the possibility of injury to him.

At this stage, we would like to make a distinction between what we will call "danger" and the employer's duty to ensure that the safety at work of all its employees is protected, as stipulated in section 124. This is what we believe Mr. Boivin is complaining about.

The position adopted by Mr. Boivin in his refusal does not only pertain to the National Bank of Hawkesbury, but also to all customer premises, when the Brinks uses a two-man crew instead of a three-man crew.

Mr. Boivin advised Mr. Delorme at the Bank of Montreal, the previous stop, that he would refuse to serve the bank if Mr. Sénéchal would not accompany him.

During all his evidence, he insisted on the fact that Mr. Sénéchal accompany him on each call.

At the National Bank, when the employer and the employee waited for Mrs. Paquet-Siou, Mr. Boivin accepted to serve the bank when Mr. Delorme asked Mr. Sénéchal to accompany him.

Was there anything different at the National Bank on November 13, 1991 that constituted a danger? An analysis of the circumstances and reasons for the decision issued by Mrs. Paquet-Siou do not show that. The only difference was the size of the crew, which confirms what was said before. Mr. Boivin's fear had nothing to do with his work place, but rather with the fact that Brinks decided to use a two-man crew. This "fear" is not supported by the definition of "danger" in a work place, provided in the Code.

Mr. Boivin also argued that Mrs. Paquet-Sioui was not competent to carry out the inquiry and did not refer to any reliable study to support her position.

We just want to remind the parties that the role of a safety officer in the case of a refusal is to listen to the arguments of each party, carry out an investigation and then decide if there is a danger. The study on the matter need not be long; this is a process to find a quick solution to a problem. The officer reviews the situation, discusses it with the parties, checks the machine, the thing or the place and determines whether there is a danger. This is what Mrs. Paquet-Sioui did in this case.

We do not conclude that Brinks' use of a two-man crew breaches its duty, under section 124, to ensure the safety and health of its employees while at work. Section 130 does not give the Board authority to make that determination. Only a safety officer, under section 145(1), can deal with that question. It was mentioned that the two-man crew had been a hot topic at the Health and Safety Committee meetings, but no conclusion had been reached. We suggest that the parties implement a mechanism in the health and safety procedures to solve all differences.

After having reviewed all circumstances and reasons for the decision, we confirm Mrs. Paquet-Sioui's decision.

Jacques Alary
J. Jacques Alary
Board Member

DATED at Ottawa this 4th day of February 1992.

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SUMMARY

CANADIAN NATIONAL RAILWAY COMPANY AND CANADIAN PACIFIC LIMITED, APPLICANTS, AND NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA ET AL. (CAW-CANADA); INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA; THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION; BROTHERHOOD OF LOCOMOTIVE ENGINEERS; UNITED TRANSPORTATION UNION AND INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, RESPONDENT UNIONS, VARIOUS INTERVENORS AND INTERESTED PARTIES.

RÉSUMÉ

COMPAGNIE DES CHEMINS DE FER NATIONAUX DU CANADA ET CANADIEN PACIFIQUE LIMITÉE, REQUÉRANTES, LE SYNDICAT NATIONAL DES TRAVAILLEURS ET TRAVAILLEUSES DE L'AUTOMOBILE, DE L'AÉROSPATIALE ET DE L'OUTILLAGE AGRICOLE DU CANADA (TCA - CANADA); LA FRATERNITÉ INTERNATIONALE DES OUVRIERS EN ÉLECTRICITÉ; L'ASSOCIATION INTERNATIONALE DES MACHINISTES ET DES TRAVAILLEURS DE L'AÉROSPATIALE; L'ASSOCIATION UNIE DES COMPAGNONS ET APPRENTIS DE L'INDUSTRIE DE LA PLOMBERIE ET DE LA TUYAUTERIE DES ÉTATS-UNIS ET DU CANADA; LA FRATERNITÉ INTERNATIONALE DES CHAUDRONNIERS, CONSTRUCTEURS DE NAVIRES EN FER, FORGERONS, FORGEURS ET AIDES; L'ASSOCIATION INTERNATIONALE DES TRAVAILLEURS DU MÉTAL EN FEUILLES; LA FRATERNITÉ DES INGÉNIEURS DE LOCOMOTIVES; LES TRAVAILLEURS UNIS DES TRANSPORTS ET LA FRATERNITÉ INTERNATIONALE DES CHAUFFEURS ET HUILEURS, SYNDICATS INTIMÉS, DIVERS INTERVENANTS ET PARTIES INTÉRESSÉES.

Board Files: 530-1848
530-1849
530-1850
530-1851

Decision No.: 917



Dossiers du Conseil : 530-1848
530-1849
530-1850
530-1851

Décision n° : 917

These reasons deal with motions which were brought in four bargaining unit review applications involving CNR and CPR. In the motions it was alleged that the Board cannot be considered an impartial or independent tribunal and should no longer entertain the review applications. The motions were, on general consent, heard together.

The motions were based primarily on remarks made by the Minister of Labour in the course of a radio interview. In those remarks the Minister appeared to refer to the applications which were before the Board at that time. The motions were also based on a meeting between the Minister and the Vice-Presidents responsible for labour relations of CNR and CPR which was alleged to have occurred prior to the Minister's radio interview.

The union parties to the motions argued that the employer parties met with the Minister for the purpose of persuading him to put pressure on the Board. The Minister, being persuaded, made the

Les présents motifs portent sur des requêtes soulevées dans quatre demandes de révision de la structure de négociation au sein de CN et de CP. Dans ses requêtes, on allègue que le Conseil ne peut pas être considéré comme un tribunal indépendant et impartial et qu'il ne peut donc plus examiner les demandes de révision. D'un commun accord, les requêtes ont été entendues simultanément.

Les requêtes se fondent essentiellement sur des déclarations faites par le Ministre du Travail au cours d'une entrevue radiophonique. Le Ministre semblait faire allusion aux demandes dont le Conseil était saisi à ce moment-là. Elles se fondent aussi sur une rencontre du Ministre et des vice-présidents responsables des relations de travail des deux employeurs en cause, rencontre qui aurait eu lieu avant l'entrevue radiophonique du Ministre.

Les syndicats qui appuient les requêtes prétendent que les employeurs ont rencontré le Ministre afin de le convaincre de faire pression sur le Conseil. Une fois convaincu, le Ministre aurait fait les

remarks in question for that purpose. Those remarks, whether or not the result of any sort of conspiracy, created in the minds of the employees a reasonable apprehension that the Board was not an independent and impartial tribunal. These allegations were assumed to be true for the purpose of argument.

The Board concluded that it met the essential conditions of judicial independence set out in Valente v. The Queen et al., [1985] 2 S.C.R. 673: (1) security of tenure; (2) financial security; and (3) the institutional independence of the tribunal in respect of administrative matters. On the basis of the facts as assumed, and the arguments made, the Board also concluded that the circumstances did not give rise to a reasonable apprehension of institutional partiality as that concept was explained in The Queen v. Lippé, no. 22072, June 6, 1991 (S.C.C.). Accordingly, to the extent that the independence or impartiality of the Board as an institution had been called in question by these motions, the motions failed and the Board remained seized of the applications. The Board, however, requested that counsel for the parties clarify some of their written representations, and directed counsel to advise the Board whether further relief was sought and if so on what grounds.

déclarations en question à cette fin. Ces remarques, qu'elles résultent ou non d'un complot quelconque, ont suscité dans l'esprit des employés une crainte raisonnable que le Conseil n'est pas un tribunal indépendant et impartial. Aux fins de l'argumentation, les allégations ont été tenues pour fondées.

Le Conseil a jugé qu'il remplissait les trois conditions essentielles de l'indépendance judiciaire énoncées dans Valente c. La Reine et autres, [1985] 2 R.C.S. 673: (1) l'inamovibilité; (2) la sécurité financière; et (3) l'indépendance institutionnelle du tribunal relativement aux questions administratives. En se fondant sur la véracité des faits et sur les arguments présentés, le Conseil a également jugé que les circonstances ne donnaient pas lieu à une crainte raisonnable de partialité, selon l'explication de la notion énoncée dans La Reine c. Lippé, no 22072, 6 juin 1991 (C.S.C.). Par conséquent, dans la mesure où l'indépendance ou l'impartialité du Conseil en tant qu'institution a été remise en question, les requêtes sont rejetées. Le Conseil demeure saisi des quatre demandes. Toutefois, le Conseil demande aux avocats d'apporter des précisions sur leurs observations écrites, de l'informer, s'il y a lieu, des nouvelles mesures de redressement recherchées et d'en donner les raisons.

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Motif de décision

Compagnie des chemins de fer nationaux du Canada (CN) et Canadien Pacifique Limitée (CP),

requérantes,

et

Syndicat national des travailleurs et travailleuses de l'automobile, de l'aérospatiale et de l'outillage agricole du Canada (TCA) et autres,

intervenants.

Dossiers du Conseil: 530-1848
 530-1849
 530-1850
 530-1851

Le Conseil se composait de M^e J.F.W. Weatherill, président, M^{mes} Ginette Gosselin et Evelyn Bourassa, ainsi que de MM. Robert Cadieux et Michael Eayrs, Membres.

L'affaire a été entendue à Ottawa les 2 et 3 janvier 1992.

Ont comparu

M^{es} M. Shannon et D. Courcy, pour Canadien Pacifique Limitée;

M^{es} J. Coleman et A. Giard, pour la Compagnie des chemins de fer nationaux du Canada;

M^e Caley, pour les Travailleurs unis des transports (TUT);

M^{es} P. Hunt et M. Lanos, pour l'Association internationale des machinistes et des travailleurs de l'aérospatiale (AIM) et la Fraternité des ingénieurs de locomotives (FIL);

M^e M. Church, pour l'Association unie des compagnons et apprentis de l'industrie de la plomberie et de la tuyauterie des États-Unis et du Canada, la Fraternité internationale des chaudroniers, constructeurs de navires en fer, forgerons, forgeurs et aides,

l'Association internationale des travailleurs du métal en feuilles et pour la Fraternité internationale des chauffeurs et huileurs;

M^{es} S. Waller et R. Ellis, pour TCA;

Aucun représentant pour la Fraternité internationale des ouvriers en électricité (FIOE);

M. A. Rosner n'était pas présent.

Les présents motifs de décision ont été rédigés par M^e J.F.W. Weatherill, Président.

Dans chacune des quatre demandes énumérées dans l'intitulé de cause, il y a une requête qui dit que le Conseil, dans les circonstances que nous allons décrire, ne peut pas être considéré comme un tribunal impartial ou indépendant et que, par conséquent, il devrait se dessaisir des quatre requêtes en question. Avec le consentement général des parties, les requêtes contestant la compétence du Conseil ont été entendues ensemble.

Si ces requêtes ont été présentées, c'est essentiellement par suite de certaines déclarations que le ministre du Travail a faites au cours d'une entrevue radiophonique (en français), le 30 octobre 1991. Une transcription des extraits pertinents de cette entrevue a été reprise dans une déclaration que le Conseil a faite au début de l'audition de l'une des demandes à trancher en l'espèce, le 5 novembre 1991. Les extraits pertinents de l'entrevue ont trait à la réponse que le Ministre a donnée quand on lui a demandé pourquoi il considérait «les trains» comme son «prochain combat». Nul n'a laissé entendre que la transcription n'était pas exacte. Voici l'extrait pertinent:

"Gilles Proulx: Quel est votre prochain combat?

Marcel Danis: Les trains, monsieur Proulx.

Gilles Proulx: Les trains?

Marcel Danis: Les trains.

Gilles Proulx: Ah oui? Ceux du CN ou de VIA Rail?

Marcel Danis: CN, CP, pas VIA Rail.

Gilles Proulx: Ah, d'accord. Le matériel de transport.

Marcel Danis: C'est ça.

Gilles Proulx: Pourquoi? Vous voulez les rendre plus efficace, plus vites?

Marcel Danis: 'C'est parce que, ce qu'on tente de faire, dans, pour ce qui est des trains, c'est de, il y a 17 conventions collectives, et on aimerait que, pouvoir négocier, que les compagnies puissent négocier avec un seul syndicat. Alors, la Commission [sic] des Relations du Travail du Canada est en train d'étudier le dossier.'

Comme aux Postes, où il y avait sept conventions collectives, et maintenant j'ai donné instruction à l'arbitre d'en faire une seule, pour ne pas avoir sept arrêts de travail à des périodes différentes, à ce moment-là, s'il y en a un, il y en a un, puis on règle celui-là, puis on a la paix pendant quelques années.'

Gilles Proulx: Ce sera intéressant à surveiller, merci beaucoup..»

Le Ministre a fait ces déclarations au moment où le Conseil était déjà saisi des quatre demandes à trancher en l'espèce, demandes qui sont toutes fondées sur l'article 18 du Code, ainsi qu'au cours des audiences portant sur les deux demandes relatives aux métiers d'atelier. Avant la reprise de l'audience sur la demande du CN concernant les métiers d'atelier, le 5 novembre 1991, les avocats de toutes les parties ont rencontré le Conseil. Tous se sont dits consternés par les déclarations du Ministre, qui ont été unanimement considérées comme déplorables. Tous les avocats ont aussi déclaré qu'il n'y avait, à leur avis, aucune partialité au Conseil ni chez les membres siégeant en l'espèce. Néanmoins, et même s'ils se sont déclarés disposés à poursuivre leur participation aux audiences, plusieurs des avocats se sont réservé le droit de soutenir, devant le Conseil ou devant une autre instance, que le Conseil en tant qu'institution ne pouvait être considéré comme indépendant ou impartial, en raison de la perception créée par les déclarations du Ministre.

Au début de l'audience tenue le 5 novembre, le Conseil a cité les remarques du Ministre et a affirmé que, malgré la position ingrate dans laquelle celles-ci le mettaient, il s'acquitterait de ses devoirs en vertu du Code.

Vers la fin de novembre 1991, les avocats des parties ont allégué que le ministre du Travail et les vice-présidents responsables des relations du travail des deux compagnies de chemins de fer requérantes s'étaient réunis (il y a une certaine confusion au sujet de la date de la rencontre, mais il semblerait qu'elle ait eu lieu le 26 août 1991). C'est alors que les requêtes dont nous sommes maintenant saisis ont été présentées pour chacune des affaires. Les avocats des compagnies intimées ont demandé des précisions et, bien qu'une ordonnance ait été demandée, le Conseil n'en a rendu aucune puisqu'il était d'avis qu'il y avait suffisamment de précisions dans la correspondance concernant les requêtes. Les syndicats qui étaient parties à ces requêtes ont demandé que des assignations duces tecum soient signifiées au ministre du Travail et aux deux vice-présidents en cause, mais le Conseil n'a pas acquiescé à cette demande, en disant qu'il se prononcerait à l'audience sur la nécessité d'obtenir une preuve testimoniale.

À l'audience, le Conseil a demandé aux avocats des syndicats qui avaient présenté ou appuyé les requêtes de préciser sur quelles allégations de fait ils se fondaient. Le Conseil a ensuite résumé ces allégations de la façon suivante:

«Il nous semble que les allégations sur lesquelles les requêtes se fondent ont été clairement énoncées. À une exception près, elles sont pertinentes. En voici un résumé global:

1. *Le ministre du Travail a fait les déclarations qu'on lui attribue le 30 octobre 1991; ces déclarations sont celles qui figurent dans la transcription du compte rendu de l'audience du 5 novembre 1991.*

2. *Il y a eu une rencontre (le 26 août 1991, semble-t-il) entre des cadres supérieurs des employeurs et le Ministre; à cette occasion, le Ministre a parlé des demandes fondées sur l'article 18 du Code qui sont*

actuellement en instance devant le Conseil. Après la rencontre, le Ministre a écrit aux employeurs en cause qu'il suivrait l'affaire de près. Les autres parties n'ont pas été invitées à cette rencontre ni à toute autre rencontre du genre.

3. Les déclarations du Ministre ont causé un considérable émoi dans le monde des chemins de fer; un grand nombre d'employés ont laissé entendre que, à leur avis, l'affaire n'était pas étudiée de façon équitable, et que le Conseil n'était pas indépendant du gouvernement.

4. Le gouvernement a généralement fait preuve d'un parti pris antisyndical, ainsi qu'en témoigne particulièrement la décision rendue récemment par la Commission des relations de travail dans la fonction publique [dans laquelle la Commission déclare que le gouvernement n'a pas négocié de bonne foi avec un agent négociateur représentant des fonctionnaires].

Selon nous, ce quatrième point n'a manifestement rien à voir avec l'affaire qui nous occupe, ou du moins fait appel à des considérations qui en sont trop loin pour avoir une valeur probante. Cela dit, la décision de la Commission des relations de travail dans la fonction publique fait partie du domaine public, de sorte que les avocats qui veulent l'invoquer dans leurs exposés pourront le faire.

Par conséquent, ce point ne constituera pas un argument acceptable. Le quatrième point valable est le suivant:

Le ministre du Travail joue un rôle dans la nomination des membres du Conseil. À cet égard, nous jugeons opportun de faire la déclaration suivante, dont l'essentiel fait partie du domaine public.

- Le Conseil a été désigné comme «ministère» aux fins de l'application de la Loi sur la gestion des finances publiques.

- Le Conseil présente son rapport annuel au Parlement par l'intermédiaire du ministre du Travail, qui doit aussi approuver ses présentations au Conseil du Trésor.

- Le Conseil est par conséquent un ministère distinct, qui ne relève pas à proprement parler d'un ministre, mais pour lequel le ministre du Travail a été désigné «ministre compétent».

- Les membres du Conseil, ses vice-présidents et son président sont nommés par le gouverneur en conseil. Il semble que leur nomination se fasse habituellement sur la recommandation du ministre du Travail. Ils sont nommés pour des mandats de cinq et de dix ans respectivement.

* * *

Nous estimons que ce qui précède peut être considéré, aux seules fins de la discussion, comme l'exposé des faits sur lesquels les requêtes se fondent. Selon nous, il n'est pas nécessaire que des témoignages soient donnés à ce stade, bien que, de toute évidence, la question pourrait évoluer de façon à le nécessiter. Néanmoins, pour l'instant, nous invitons les avocats à présenter leurs arguments en se fondant sur les faits précisés ci-

dessus, en dégageant les implications qu'ils jugent les plus favorables à leurs thèses."

(traduction)

Les avocats ont donc été invités à présenter l'argument en se fondant sur l'hypothèse qui leur serait la plus favorable, à savoir, pour parler crûment, que les représentants des employeurs ont rencontré le Ministre afin de le convaincre de faire pression sur le Conseil, et que le Ministre, une fois convaincu, a fait ses déclarations dans ce dessein. Quoi qu'il en soit, le Ministre a bel et bien fait les déclarations que nous avons citées, et ces déclarations, qu'elles résultent ou non d'un complot quelconque, ont suscité, prétend-on, des appréhensions dans l'esprit des employés, qui craignent que le Conseil ne soit pas un tribunal indépendant et impartial.

La procédure que le Conseil a suivie en l'espèce est globalement semblable à celle qu'il adopte dans les cas de requêtes en annulation d'une demande pour le motif qu'elle ne divulgue pas la cause d'action: si l'on suppose que les allégations sont fondées, justifient-elles la demande de redressement? Les avocats favorables aux requêtes étaient mécontents de voir le Conseil opter pour cette procédure, et ils ont prétendu que, s'ils n'avaient pas la possibilité d'interroger le Ministre et les représentants des deux compagnies, ils risquaient de ne pas pouvoir produire leurs «meilleurs éléments de preuve». Le fait est que, avec une procédure comme celle que nous avons suivie, les avocats n'avaient pas besoin de preuves aux fins de l'argumentation, étant donné que nous partions du principe que leurs allégations étaient fondées.

Peu après que les requêtes eurent été débattues, l'avocat de certains des syndicats intimés a informé le Conseil qu'à la suite d'une demande faite au ministère du Travail en vertu de la Loi sur l'accès à l'information, il avait obtenu de la correspondance qui mettait en cause le Ministre et qui portait sur cette question.

Cette correspondance a été transmise au Conseil et a donc été distribuée à toutes les parties à la présente affaire. Celles-ci ont par la suite eu l'occasion de présenter des observations écrites à ce sujet. La plupart des avocats, mais non tous, ont profité de l'occasion et ont soutenu que la correspondance en question confirmait leurs points de vue. Elle ne précisait clairement aucun nouvel élément à l'appui de la requête, mais pour plus de clarté et de précision, nous croyons qu'il serait bon de parler brièvement de cet aspect.

Il s'agit de quatre lettres. La première est une lettre non datée que le Ministre du Travail a adressée à M^{me} Louise Piché, vice-présidente des ressources humaines du CN. Le Ministre remercie M^{me} Piché d'avoir fait connaître son opinion sur diverses questions touchant le secteur ferroviaire, et indique qu'il suivra avec intérêt les affaires concernant les relations du travail dans le secteur ferroviaire. Cette lettre révèle qu'il y a en fait eu une rencontre, comme nous l'avions présumé. Les trois autres, qui sont datées du 4, du 7 et du 12 novembre 1991 respectivement, ont été échangées entre le Président du Conseil et le Ministre du Travail. Ces dernières ne portent pas sur le fond des demandes présentées au Conseil, mais plutôt sur des observations faites au Ministre selon lesquelles les remarques faites au cours de l'entrevue radiophonique pourraient être interprétées par certains comme une tentative d'ingérence dans une des affaires dont le Conseil était saisi.

Passons maintenant à l'argument fondé sur les faits dont on présume la véracité. Peut-on vraiment affirmer qu'une «personne renseignée et sensée, examinant la situation de l'extérieur, ne pourrait croire qu'il serait plus probable que la Commission rende une décision qui ne serait pas équitable à l'égard des requérants»? (Cette question est posée en ces termes par le juge Mahoney dans Sethi c. Canada (Ministre de l'Emploi et de l'Immigration) (C.A.),

[1988] 2 C.F. 552, page 562.) Tous reconnaissent que le tribunal doit être indépendant et impartial, de sorte que la question à trancher consiste à savoir si une personne renseignée pourrait raisonnablement considérer le Conseil autrement que comme un tel tribunal, dans les circonstances postulées (et incontestées) de la présente affaire.

La notion d'indépendance judiciaire «connote non seulement un état d'esprit et une attitude dans l'exercice concret des fonctions judiciaires, mais aussi un statut, une relation avec autrui, particulièrement avec l'organe exécutif du gouvernement, qui repose sur des conditions ou garanties objectives» (Valente c. La Reine et autres, [1985] 2 R.C.S. 673, page 685). Les trois conditions essentielles de l'indépendance judiciaire sont (1) l'inamovibilité (pages 694-704); (2) la sécurité financière (pages 704-708); et enfin (3) l'indépendance institutionnelle du tribunal relativement aux questions administratives (pages 707-712).

En ce qui concerne les critères (1) et (2), les nominations au Conseil sont, comme nous l'avons précisé, pour des périodes fixes assez longues, et la révocation des membres du Conseil doit être «motivée» (voir le paragraphe 10(2) du Code canadien du travail). La sécurité financière est garantie par l'inamovibilité. Par ailleurs, en ce qui concerne le troisième critère, le Conseil est un ministère distinct depuis 1973. Le rapport Woods (Les relations du travail au Canada: Rapport de l'Équipe spécialisée en relations de travail, Ottawa, Bureau du Conseil privé, décembre 1968) avait recommandé que ce statut lui soit accordé afin de souligner son indépendance vis-à-vis du ministère du Travail et du gouvernement de l'heure. Bien que le ministre du Travail soit le «ministre compétent» au sens de la Loi sur la gestion des finances publiques, comme nous l'avons précisé, cela n'implique pas qu'il ait un droit de regard quelconque sur les fonctions décisionnelles du Conseil ou sur son administration interne. À cet égard, ce que la Cour

suprême du Canada a déclaré dans MacKeigan c. Hickman, [1989] 2 R.C.S. 796, est significatif:

«Il importe de souligner que, dans l'arrêt Beauregard c. Canada, on propose non pas la séparation absolue du pouvoir judiciaire, dans le sens d'une absence totale de rapports avec les autres organes du gouvernement, mais une séparation de ses pouvoirs et fonctions. Il est impossible de concevoir un pouvoir judiciaire dénué de tout rapport avec les pouvoirs législatif et exécutif du gouvernement. Les lois régissent la nomination et la mise à la retraite des juges; elles dictent les modalités de l'exercice de leurs fonctions et de leur rémunération. Le Parlement détient le pouvoir de destituer pour un motif déterminé les juges nommés par le fédéral, et des textes de loi comme la Loi sur la Cour suprême, S.R.C. 1970, chap. S-19, traitent de matières telles que le nombre de juges requis pour qu'il y ait quorum. Des relations de ce genre sont inévitables et nécessaires entre les organes judiciaire et législatif du gouvernement. La condition capitale du maintien de l'indépendance judiciaire est que les relations entre le pouvoir judiciaire et les autres organes du gouvernement ne doivent pas empiéter sur les «pouvoirs et fonctions» essentiels du tribunal, pour reprendre les termes du juge en chef Dickson...»

(pages 827-828)

Bien entendu, le Conseil n'est pas une cour, mais bien un tribunal administratif. À ce propos, il y a lieu de noter ce que la Cour suprême a déclaré dans Brosseau c. Alberta Securities Commission, [1989] 1 R.C.S. 301:

«Les tribunaux administratifs sont créés pour diverses raisons et pour répondre à divers besoins. Lorsqu'il établit ces tribunaux, le législateur est libre de choisir la structure de l'organisme administratif. Il déterminera, entre autres, sa composition et les degrés de formalité requis pour son fonctionnement. Dans certains cas, il estimera souhaitable, pour atteindre les objectifs de la loi, de permettre un chevauchement de fonctions qui, dans des procédures judiciaires normales, seraient séparées. Dans l'appréciation des activités de tribunaux administratifs, les cours doivent tenir compte de la nature de l'organisme créé par le législateur. Si la loi autorise un certain degré de chevauchement de fonctions, ce chevauchement, dans la mesure où il est autorisé, n'est généralement pas assujetti per se à la doctrine de la «crainte raisonnable de partialité». En l'espèce, l'appelant se plaint de ce que le président a pris part à la fois à l'enquête et à la décision et qu'en conséquence il y a lieu d'empêcher la poursuite de l'audition au motif de crainte raisonnable de partialité.»

(page 310)

Dans Brosseau, l'appelant n'a pas eu gain de cause. La Cour fait la remarque suivante, elle aussi pertinente en l'espèce:

«Outre la question de l'autorisation accordée par la loi, il y a aussi lieu de tenir compte d'autres facteurs. Par exemple, dans un organisme spécialisé comme la Commission, il est plus que probable que les mêmes instances décisionnelles auront des contacts répétés avec une partie donnée, à de nombreuses occasions et pour diverses raisons...»

(page 313)

Bref, nous croyons pouvoir objectivement déclarer que le Conseil satisfait à la fois au critère de l'indépendance institutionnelle et à celui de l'indépendance de ses membres. La constitution du Conseil, la nomination et l'inamovibilité de ses membres et les dispositions prises à l'égard de son administration, tout cela mène à cette conclusion.

Le tribunal doit être non seulement indépendant, mais aussi impartial. Autrement dit, «[n]onobstant l'indépendance judiciaire, il peut aussi exister une crainte raisonnable de partialité sur le plan institutionnel ou structurel» (La Reine c. Lippé, n° 22072, 6 juin 1991 (C.S.C.), page 26). La Cour a déclaré ce qui suit:

«Le statut objectif du tribunal peut s'appliquer tout autant à l'exigence d'«impartialité» qu'à celle d'«indépendance». Par conséquent, qu'un juge particulier ait ou non entretenu des idées préconçues ou des préjugés, si le système est structuré de façon à susciter une crainte raisonnable de partialité sur le plan constitutionnel, on ne satisfait pas à l'exigence d'impartialité...»

(page 27)

Selon nous, les faits dont on présume la véracité, et les arguments présentés ne permettent à quiconque de craindre pour notre impartialité. Pour des raisons semblables à celles que nous avons données au sujet de notre indépendance, nous estimons qu'une personne renseignée ne pourrait pas raisonnablement croire que le Conseil, pris en tant qu'institution, n'est pas impartial. Il reste à déterminer si l'on peut raisonnablement craindre, à partir

des faits postulés dans la présente affaire, que nous ayons un parti pris dû à un lien de dépendance ou à une partialité quelconque.

Compte tenu de l'hypothèse (et il vaut la peine de souligner qu'il ne s'agit de rien de plus que d'une hypothèse) que des représentants des deux compagnies ont rencontré le Ministre dans le dessein de l'amener à faire pression sur le Conseil, et que le Ministre a fait la déclaration qu'on lui reproche à cette fin, une personne sensée et renseignée conclura-t-elle raisonnablement que le Conseil a un parti pris, autrement dit qu'il est «plus probable qu'[il] rende une décision qui ne [sera] pas équitable à l'égard des requérants et des appellants en raison de l'intention du gouvernement» (Sethi, supra)? Nous ne le pensons pas. Comme l'a dit le juge Mahoney dans l'arrêt Sethi, à la page 562, «la simple expression par le gouvernement de ses intentions à l'égard d'un tribunal administratif ne peut soulever une probabilité que le tribunal va réagir à celles-ci d'une façon particulière dans les décisions qu'[il] est [appelé] à rendre». En l'espèce, bien entendu, nous avons retenu aux fins de la discussion le postulat que non seulement les intentions du gouvernement ont été exprimées, mais aussi qu'il y a eu une rencontre entre le Ministre et des représentants des compagnies à l'occasion de laquelle le Ministre a été persuadé d'exprimer ces intentions.

Le simple fait qu'il y a eu rencontre entre un employeur ou un groupe d'employeurs et un ministre ne signifie rien. En effet, il devrait être évident qu'il est naturel et souhaitable que le ministre du Travail rencontre tous les secteurs de la «clientèle» avec laquelle son Ministère traite et qu'il soit au courant des préoccupations des parties, qui peuvent avoir trait notamment à des affaires en instance devant le Conseil. Là où il peut y avoir problème, c'est lorsqu'un ministre cherche à influer sur une décision du Conseil. Même si nous supposons que les allégations

sur lesquelles la présente requête repose sont fondées, rien ne relie la rencontre entre les parties et le Ministre - ou les déclarations du Ministre - au Conseil, si ce n'est que ces déclarations ont été faites publiquement. Toutefois, comme la Cour a conclu dans Sethi, supra, des déclarations publiques comme celles-là ne soulèvent pas «une probabilité que le tribunal va réagir à celles-ci d'une façon particulière dans les décisions qu'[il] est [appelé] à rendre». D'ailleurs, comme le juge Gonthier l'a déclaré dans SITBA c. Consolidated-Bathurst Packaging Ltd., [1990] 1 R.C.S. 282, page 334, le critère déterminant de l'indépendance n'est pas «l'absence d'influence, mais plutôt la liberté de décider selon ses propres conscience et opinions». Selon nous, notre liberté n'a pas été minée par les déclarations du Ministre ni par la rencontre que les employeurs ont eue avec lui.

Comme nous l'avons fait remarquer, le fait qu'un ministre exprime ses opinions ou qu'un tribunal connaisse celles-ci ne nuit pas au pouvoir ou au fonctionnement de ce tribunal ou ne suscite pas de crainte raisonnable quant à son impartialité ou à son indépendance. Dans Re Winnipeq Free Press Ltd. and Newspapers Guild, CLC, AFL-CIO (1974), 44 D.L.R. (3d) 274 (C.A. Man.), le Premier ministre du Manitoba et le ministre du Travail de cette province avaient fait des déclarations dans lesquelles ils exprimaient très clairement leur espoir qu'une demande d'accréditation que devait alors trancher le Conseil des relations du travail du Manitoba serait agréée, et qu'elle le serait rapidement. Le juge Wilson avait par la suite rejeté une demande de certiorari visant à obtenir la révocation du certificat délivré par le Conseil, en raison du présumé parti pris de ce dernier, et cette décision a été maintenue par la Cour d'appel du Manitoba pour les motifs donnés par le juge. Ceci dit, Winnipeq Free Press, supra, et l'affaire que nous devons trancher en l'espèce diffèrent sur certains points. Il est vrai que, en l'espèce, le présent Conseil doit trancher des demandes

réclamant l'application de principes à l'égard desquels le présent Conseil dispose d'une grande latitude. Les possibilités de son homologue manitobain d'exercer réellement son pouvoir discrétionnaire étaient moindres dans Winnipeg Free Press. Par contre, il semble clair que, dans cette affaire, les déclarations des hommes politiques étaient beaucoup plus catégoriques et plus claires que ne l'étaient celles du Ministre dans la présente affaire. À cet égard, les observations du juge Wilson sont révélatrices:

«Qu'ils soient délibérés ou irréfléchis, les commentaires faits par d'autres au sujet d'affaires dont est saisi un tribunal sont, à tout le moins, inutiles. On peut en dire autant des activités de personnes qui, il serait raisonnable de le penser, sont conscientes du caractère délicat d'une situation, mais qui néanmoins se livrent à des activités visant à provoquer des remarques qui seraient considérées par certains comme incendiaires.

Cette remontrance mise à part, les commentaires désinvoltes faits par le Premier ministre dans les circonstances ne se traduisent pas facilement en une forme d'ingérence dans le travail du Conseil.

... [Le] Conseil - n'est pas une tribune de fonctionnaires, dont les possibilités d'avancement reposeraient, dans une certaine mesure, sur la reconnaissance du mérite par le Ministre qui pourrait initier ou approuver la promotion... Il est vrai que les membres reçoivent un émolumen, mais je ne leur ferai pas l'affront de prétendre que, dans leur travail, plus précisément dans leur traitement de cette affaire, ils sont guidés par la crainte d'être congédiés ou l'espoir d'être choisis.

À mon avis, le ministre du Travail ne jugera pas inconvenant de ma part de déclarer que la promotion qu'il a fait de l'idée d'adhésion syndicale pour toutes les personnes qui travaillent n'est pas un secret. Il y aurait certes divergence d'opinions quant à l'à-propos de son entrée dans l'arène, pour venir en aide à la sollicitation d'adhésions, mais un observateur de la scène des relations du travail ne serait pas étonné d'apprendre que le Ministre prône l'accréditation. Bien entendu, même si l'on exige que les fonctionnaires soient neutres, le fait est qu'un ministre élu peut témoigner de ses préférences. Toutefois, que le ministre préconise une certaine philosophie ne constitue pas un motif sûr pour attaquer, au moyen de poursuites, le travail de son ministère, et encore moins le travail d'un conseil dont l'indépendance est prévue par la législation mentionnée.»

(pages 280-281; traduction)

Ici non plus, comme le Conseil n'a pas manqué de le souligner dans la déclaration qu'il a faite à l'audience du 5 novembre 1991

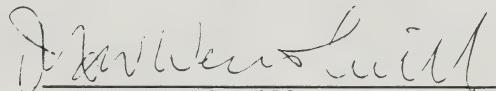
- déclaration que nous avons citée - il n'est pas surprenant que le gouvernement se soit intéressé aux résultats des affaires en question, en sa qualité d'actionnaire de l'une des parties aux demandes fondées sur l'article 18 que nous devons trancher. Selon nous, le fait qu'un ministre exprime pareil intérêt ne devrait pas mener un observateur raisonnable et renseigné à conclure qu'il existe une réelle possibilité de parti pris de la part du tribunal qui entend l'affaire.

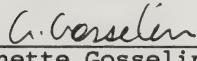
Dans un autre contexte, les déclarations du Ministre auraient pu passer inaperçues. Toutefois, elles portaient sur une affaire de relations du travail très délicate où les enjeux pour toutes les parties sont élevés, qui est entourée de beaucoup d'émotivité et où l'existence même de certains organismes peut être en danger. Comme l'a dit M. Rosner, un des représentants d'un certain nombre de syndicats de métiers dans les affaires concernant les métiers d'atelier, et qui est intervenu personnellement dans l'affaire CP (et qui n'appuie pas formellement les requêtes dont nous sommes saisis), à la fin de la plaidoirie qu'il a présentée dans cette affaire, ce qu'il nous faut maintenant - qu'elle que soit l'issue des demandes de réexamen - c'est une période d'accalmie entre les parties de même qu'entre les groupes d'employés en cause et leurs représentants.

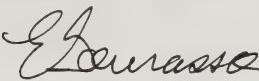
En l'espèce, nous estimons que ni ses déclarations, ni la rencontre qui les aurait inspirées ne peuvent être raisonnablement invoquées pour justifier la conclusion que le Conseil manque d'une façon quelconque d'indépendance ou d'impartialité. Elles n'ont aucun effet sur l'exercice de notre compétence ou sur notre capacité de nous acquitter de nos véritables fonctions. Par conséquent, dans la mesure où l'indépendance ou l'impartialité du Conseil en tant qu'institution a été remise en question, les requêtes sont rejetées. Le Conseil demeure saisi des quatre demandes. Les demandes visant le personnel itinérant seront entendues comme il

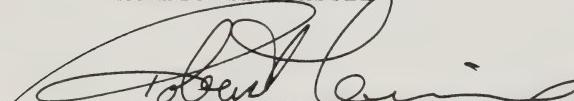
a été prévu, et les décisions seront rendues dans les affaires concernant les métiers d'atelier.

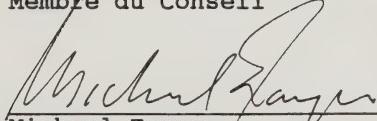
Toutefois, en ce qui a trait à la correspondance entre le Président et le ministre du Travail, les observations des avocats - et surtout celles de M^e Caley dans les affaires concernant le personnel itinérant - sont quelque peu ambiguës. Le Conseil demande donc aux avocats de l'informer, pour chaque demande, s'ils désirent qu'un autre banc remplace le banc existant et de donner leurs raisons. Les parties doivent faire part de leur position au Conseil, au plus tard le vendredi 28 février 1992.


J.F.W. Weatherill
Président


Ginette Gosselin
Membre du Conseil


Evelyn Bourassa
Membre du Conseil


Robert Cadieux
Membre du Conseil


Michael Eayrs
Membre du Conseil

DONNÉS À OTTAWA, ce 18^{ème} jour de février 1992.

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Summary

AMALGAMATED TRANSIT UNION,
APPLICANT, AND BRINK'S CANADA
LIMITED, EMPLOYER AND CANADIAN
CONFERENCE OF TEAMSTERS, TEAMSTERS
LOCALS 362 AND 979, AND THE RETAIL,
WHOLESALE AND DEPARTMENT STORE
UNION, INTERESTED PARTIES.

Résumé de Décision

LE SYNDICAT UNI DU TRANSPORT,
REQUÉRANT, ET BRINK'S CANADA
LIMITED, EMPLOYEUR, ET LA
CONFÉRENCE CANADIENNE DES
TEAMSTERS, SECTIONS LOCALES 362 ET
979 DU SYNDICAT DES TEAMSTERS, ET
L'UNION DES EMPLOYES DE GROS, ET
DÉTAIL ET DE MAGASINS À RAYONS,
PARTIES INTÉRESSÉES.

Board File: 555-3308

Dossier du Conseil: 555-3308

Decision No.: 918

No de Décision: 918

In this decision the Board found
that all the Canadian operations of
Brink's Canada Limited constitute a
federal work, undertaking or
business within the meaning of
section 4 of the Canada Labour
Code.

The Board assumed jurisdiction
because of the regular and
continuous nature of the extra-
provincial activities carried on by
the employer and because of the
high degree of integration of all
parts of the undertaking with the
extra-provincial transportation
activities.

Dans cette affaire, le Conseil a
conclu que toutes les activités
canadiennes de Brink's Canada
Limited constituaient une
entreprise fédérale aux termes de
l'article 4 du Code canadien du
travail.

Le Conseil a déclaré qu'il était
compétent pour entendre l'affaire
en raison du caractère continu et
régulier des activités
extraprovinciales de l'employeur et
de la forte intégration des divers
secteurs de l'entreprise avec les
activités de transport
extraprovincial.



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Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

Amalgamated Transit Union,

applicant,

and

Brink's Canada Limited,

employer

and

Canadian Conference of
Teamsters, Teamsters Locals
362 and 979, and
the Retail, Wholesale and
Department Store Union,

interested parties.

Board File: 555-3308

The Board was composed of Messrs. Hugh R. Jamieson and J. Philippe Morneau, Vice-Chairmen and Mr. François Bastien, Member.

Appearances:

Mr. James H. Daley, for the applicant;

Messrs. Jeffrey Pagano, George Vassos, Neil Bryson and Gérard Riendeau, for the employer;

Messrs. Larry Kowalchuk and Gary Burkhardt, for the Retail, Wholesale and Department Store Union;

Messrs. Alvin R. McGregor, Roy A. Finlay and T. Bateman, for Canadian Conference of Teamsters, Teamsters Local 362 and 979.

These reasons for decision were written by J. Philippe Morneau, Vice-Chairman.

I

These reasons deal only with the issue of the Board's constitutional jurisdiction to regulate the labour relations of Brink's Canada Limited (the employer or BCL). This issue arose in an application for certification filed on May 10, 1991 by the Amalgamated Transit Union (the union or ATU), seeking to represent certain BCL employees working in Calgary, Alberta.

A hearing was held with respect to the jurisdictional question at Calgary on September 25 and 26, 1991, and on November 1, 1991 the parties were notified that the Board had decided that it had jurisdiction and that it had certified the union to represent certain BCL employees. These are the Board's reasons for deciding that it had jurisdiction in this matter.

II

At the hearing, the Canadian Conference of Teamsters, Teamsters Locals 362 and 979 (the Teamsters), appeared because they had been notified by the Board that the decision in this matter might impinge on their application for certification to represent certain BCL employees working in Winnipeg which was pending before the Board. The Retail, Wholesale and Department Store Union (RWDSU) requested and was accorded interested party status.

In its reply to the application for certification the

employer described its operations as the transport of money and valuables with safety and dispatch. It stated that its Calgary branch is ready, willing and able to transport money and valuables any time across provincial or international boundaries. The employer also stated that it had recently secured a contract with a major chartered bank. Under the terms of the contract, it would have one of its trucks loaded at Calgary and proceed to various locations in British Columbia before returning to Calgary. That reply also indicated that every second week BCL air courier employees accompany valuables on flights originating from Ottawa and ending in Calgary; those employees are met at the Calgary airport by the employer's armoured truck employees who receive the money and deliver it to the Bank of Canada in Calgary. The armoured truck employees also meet an air courier employee at the Edmonton airport every Friday night to pick up parcels on a flight originating from Toronto.

At the hearing the employer submitted into evidence copies of extra-provincial transport licences and permits issued to BCL by all provincial and territorial motor carrier authorities in Canada except the Northwest Territories, and by the U.S. Interstate Commerce Commission. A copy of an excerpt from a form filed in respect of the Pittston Company, the parent company of BCL, with the Securities and Exchange Commission in Washington, D.C., was presented to the Board. This document indicates that Brink's major activities are as contract carrier armoured car services, air courier services, coin wrapping services, currency processing services and automatic teller machine servicing. It has 140 branches in the United States and 39 branches in Canada. Brink's also provides service through

subsidiary, affiliated and associated companies in 42 other countries around the world.

Documentary and oral evidence presented to the Board showed regular and continuous interprovincial road transportation activity by armoured cars originating from every Canadian province except Newfoundland, Nova Scotia and Saskatchewan, and showed regular and continuous international road transportation activities originating from British Columbia and Ontario and terminating at various destinations in the United States. Thus, a total of 2299 interprovincial or international road trips were made in the preceding year by BCL employees. Specific evidence of the extra-provincial ground transportation into British Columbia by the Calgary BCL employees was also detailed. Evidence was also presented with respect to an international armoured tractor trailer operation originating from Toronto and Montréal. These armoured tractor trailers based in Montréal operate on call where required and are serviced by regular armoured vehicles for pick-ups and deliveries.

The evidence adduced also shows that BCL provides air courier services into and out of Montréal, Toronto, Vancouver, Calgary, Edmonton, Regina, Winnipeg, Victoria, Saint John, St. John's, Halifax, Ottawa, Yellowknife and Whitehorse. The flights involved connect each of these locations with locations in other provinces. Some international flights to the United States are made directly from many of the BCL branches in Canada; however, the majority of international flights are made between Toronto and New York City and between Ottawa and New York City in the so-called Brink's triangle operation. BCL does not own any of the planes used for its air courier service.

It uses chartered and non-chartered flights. When a chartered flight is used it is under the full control of BCL. When a non-chartered flight is used, a Brink's air courier employee accompanies the cargo that is being transported to ensure its secure transportation. On such non-charter flights special arrangements are made with the airline chosen by Brink's so that the air courier employee who accompanies each shipment is the last to board and the first to deplane. This employee is responsible for guarding the valuables shipped and must ensure that the said valuables arrive at the plane, are loaded on board and then discharged onto an armoured vehicle when the plane arrives at destination.

The air courier system and the ground transport system (including the international tractor trailer operation) are necessarily linked and integrated to ensure the secure transportation of valuables on a national, continental and world-wide basis. The air courier system could not operate without the ground transport system. Every delivery from a Brink's air courier originates from a Brink's armoured vehicle and is met at the destination airport by a Brink's armoured vehicle. Any BCL employee anywhere in Canada might be involved in a shipment of valuables across provincial and national boundaries.

Evidence was led to show that all services provided by BCL, such as coin wrapping and currency processing, described as the packer operation, and the automatic teller machine services, arose out of the relationship it had with certain of its major clients, i.e. chartered banks and the Bank of Canada. These services are ancillary and are designed to increase its main business being the secure transportation

of money and valuables anywhere in the world at any time. Therefore these services are closely integrated in the BCL undertaking.

All BCL employees and branch offices must comply with standards established by Brink's head office and world headquarters in Darien, Connecticut, with respect to the secure transportation of valuables. These standards or general security regulations cover matters ranging from the crew complements and operation methods to the design and modification of armoured vehicles. They are directly related to the comprehensive insurance coverage that is provided with regard to all valuables transported by Brink's through its special relationship with Lloyd's of London. Liability limits are established for each branch and for each armoured vehicle. BCL finances are controlled and directed from the world headquarters.

BCL's Canadian head office is located in Don Mills, Ontario. It handles the national marketing operation of BCL and reports directly to Brink's world headquarters. It ensures on a day-to-day basis that the Canadian regional and branch offices comply with Brink's standards. Regional offices are located in Halifax, Hamilton, Toronto, Winnipeg, and Calgary. The employees' payroll is prepared at each branch office but handled nationally from the Canadian head office. A decision to purchase an armoured vehicle for a branch is made at the Canadian head office, in accordance with design specifications established at world headquarters.

Regional managers ensure compliance with the standard policies and procedures in the branches under their

respective supervision. The pricing on individual client accounts is ordinarily done at the regional office supervising the branch involved with the larger client accounts being priced at the Canadian head office. Branch managers are encouraged to recommend new ventures but decisions on such are made at the Canadian head office.

III

The constitutional authority of the Board to deal with labour relations is set out in section 4 of the Canada Labour Code (Part I - Industrial Relations). It states:

"4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers."

Section 2 of the Code defines "federal work, undertaking or business" as follows:

"federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

(a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada,

(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,

(c) a line of ships connecting a province with any other province, or extending beyond the limits of a province,

(d) a ferry between any province and any

other province or between any province and any country other than Canada,

(e) aerodromes, aircraft or a line of air transportation,

(f) a radio broadcasting station,

(g) a bank,

(h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces, and

(i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces."

Of particular relevance in this case is paragraph (b) of the above definition. This part of the definition reproduces almost verbatim the wording of section 92(10)(a) of the Constitution Act which states:

"92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,-

...

10. Local Works and Undertakings other than such as are of the following Classes:-

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province; ..."

As can be seen each province normally has constitutional jurisdiction to deal with labour relations of "Local Works and Undertakings" other than such as are excepted by section 92(10)(a).

The determination whether any work, undertaking or business is excepted from provincial jurisdiction depends

on whether, on the facts of each case, it is a work or undertaking connecting the province with another or extends beyond the boundaries of the province. As the Privy Council stated in Attorney-General for Ontario et al. v. Winner et al., [1954] 4 D.L.R. 657 :

"... The question is whether in truth and in fact there is an internal activity prolonged over the border in order to enable the owner to evade provincial jurisdiction or whether in pith and substance it is interprovincial. Just as the question whether there is an interconnecting undertaking is one depending on all the circumstances of the case so the question whether it is a camouflaged local undertaking masquerading as an interconnecting one must also depend on the facts of each case and on a determination of what is the pith and substance of an Act or Regulation."

(page 680)

In determining whether a work or undertaking is interprovincial the authorities have looked at whether the extra-provincial operations of the work or undertaking are carried on on a "regular and continuous" basis. Extra-provincial operations carried on on a casual or exceptional basis will not be sufficient to classify an otherwise local work or undertaking as interprovincial and thus escape from provincial jurisdiction. See Winner, supra; Northern Telecom Limited v. Communications Workers of Canada et al., [1980] 1 S.C.R. 115; (1979), 98 D.L.R. (3d) 1; and 79 CLLC 14,211; Northern Telecom Canada Limited v. Communications Workers of Canada et al., [1983] 1 S.C.R. 733; (1983), 147 D.L.R. (3d) 1; and 83 CLLC 14,048; Regina v. Cooksville Magistrate's Court, Ex parte Liquid Cargo Lines Ltd., [1965] 1 O.R. 84; and (1964), 46 D.L.R. (2d) 700, (H.C.J.); Regina v. Toronto Magistrates, Ex Parte Tank Truck Transport Ltd., [1960] O.R. 497; and

(1960), 25 D.L.R. (2d) 161 (H.C.J.); and Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 et al. (1983), 44 O.R. (2d) 560; and 84 CLLC 14,006 (C.A.).

The Board has also applied the "regular and continuous" test. See The Gray Line of Victoria Ltd. (1989), 77 di 169; and 5 CLRBR (2d) 226 (CLRB no. 741); and Burns Foods (Transport) Ltd. (1990), as yet unreported CLRB decision no. 809. The Gray Line of Victoria Ltd. case provides a useful overview of some of the salient points drawn from the above-noted authorities:

"The Liquid Cargo Lines Ltd. decision, supra, stands for the principle that regular and continuous does not necessarily mean that extra-provincial trips have to be made in accordance with a predetermined schedule. In this case the Court took into account the fact that the operator of the business stood ready at any time to provide extra-provincial service.

...

In Tank Truck Transport Ltd., supra, the Court said that occasional or irregular extra-provincial operations do not transform a provincial undertaking into a federal undertaking; again, the Court referred to the regular and continuous test.

...

In the Ottawa-Carleton Regional Transit Commission case, supra, a quantitative test was rejected in favour of the regular and continuous test. ..."

(pages 174-175; and 230-231)

In Emery Worldwide (1989), 79 di 71; and 7 CLRBR (2d) 49 (CLRB no. 768), this Board dealt with a company engaged in freight forwarding on a world-wide basis. Its U.S.

network utilized 55 company-owned aircraft to transport freight and packages to world-wide destinations. Its Canadian operations were similar but used third-party subcontractors to carry out interprovincial transport. At the hearing, Emery Worldwide claimed that it was simply a freight forwarder and thus outside this Board's jurisdiction. It relied on the "freight forwarding" cases, In Re Cannet Freight Ltd., [1976] 1 F.C. 174; (1975), 60 D.L.R. (3d) 473; and 11 N.R. 606 (C.A.) (hereinafter Cannet), and Re The Queen and Cottrell Forwarding Co. (1981), 33 O.R. (2d) 486; and 124 D.L.R. (3d) 674 (Div. Ct.) (hereinafter Cottrell) to support its position.

In these two freight forwarding cases, the Court held that otherwise local undertakings which use a separate and distinct interprovincial undertaking (CN Rail) to ship freight across provincial boundaries do not thereby become interprovincial undertakings and do not fall within federal jurisdiction. The judgment of Steele, J., for the Court in Cottrell illustrates the reasoning of the Courts on both cases:

"... The railway company is the only body carrying on the interprovincial undertaking and it has the physical works as well. Clearly, if an individual customer of Cottrell wished to ship goods to the west, it would contract with the railway company to ship such goods. The mere fact that by contract Cottrell agrees with that individual customer to enter into the contract with the railway company and become the shipper itself, does not make Cottrell anything other than a shipper. The shipment is merely part of an over-all contract and a person who has no tangible or physical property under its control to operate an undertaking cannot, by contract, make himself a person carrying on an undertaking within the meaning of s. 92(10)(a) of the British North America Act, 1867. Cottrell

is not carrying on an undertaking or operation but is merely providing a service by contract. To hold otherwise would mean that any travel broker or other person engaged in general commerce could, by contract, provide interprovincial undertakings, even though he had no facilities whatsoever, and thereby claim that he was not subject to provincial jurisdiction. . . ."

(pages 492; and 679-680)

The Board in Emery, supra, distinguished Cannet and Cottrell on the basis that in both Cannet and Cottrell, the local undertakings were wholly independent of the interprovincial undertaking, CN Rail. In Emery, supra, the regional operations were found to be part of Emery Worldwide which was a federal undertaking on the basis of daily flights from Dayton, Ohio, to Toronto, Montréal and Ottawa. The Board's decision in Emery, supra, was upheld by the Federal Court of Appeal.

A similar situation confronted the Ontario Labour Relations Board in Ryder Truck Lines, [1984] OLRB Rep. April 649. In that case a complaint had been brought by an employee against Ryder/P.I.E. Nationwide Inc. (Ryder U.S.). Ryder Canada was operated as a division of Ryder U.S. Both Ryder companies were engaged in the transport business. Ninety percent of the loads carried by Ryder Canada were destined for or originated from points in the United States. Ryder Canada drivers and their trucks always remained within the borders of Ontario. They would leave their trailers at a point near the Ontario/U.S. border where they would be picked up and transported into the United States by Ryder U.S. drivers. The same process operated in reverse when goods were being brought into Canada. In each case Ryder U.S. drivers transported the goods across the border. Ryder Canada drivers never

crossed the Ontario borders. The following was the conclusion of the OLRB:

"... The fact that tractors and employees of Ryder Canada may always remain in Ontario does not preclude the labour relations of that company from falling within federal jurisdiction. Ryder Canada hauls trailers which have crossed or are about to cross international boundaries. It does so as a functionally integrated part of the Ryder undertaking, of which Ryder Canada and Ryder U.S. are interdependent and operationally connected components. If that undertaking were conducted by one corporation, there would be no question that its labour relations with employees in Canada would be governed by federal legislation. The fact that there are two distinct corporations involved in the undertaking does not lead to a different result. ..."

(page 650)

In Brink's Canada Limited v. Retail, Wholesale and Department Store Union, Local 454 (1976), 77 CLLC 14,087, (hereinafter the Brink's decision), the Saskatchewan Court of Appeal upheld a certification order issued by the Saskatchewan Labour Relations Board to the union to represent a province-wide unit of BCL employees. This decision is predicated upon the facts that in the disposition of the application the Saskatchewan Board was concerned only with the work and undertaking of BCL in Saskatchewan and that the limited air courier service carried on by BCL was not sufficient to transform it into an interprovincial undertaking.

IV

Brink's Canada Limited holds itself out to the public as a network for the secure transportation of valuables on a world-wide basis. It has obtained the licences and permits necessary to establish the legal basis to put its public

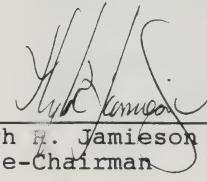
promises into effect.

In BCL's ground operations, valuables are transported in armoured vehicles in accordance with standard procedures and regulations established by its world headquarters. The ground operations and the air transport operations are centrally co-ordinated elements of the overall Brink's transportation network.

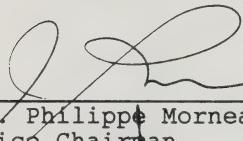
BCL does not own any aircraft for its air transportation operations. However, it uses some chartered aircrafts which are under its control and on non-charter flights, a Brink's air courier employee accompanies and guards each shipment. BCL is not simply an ordinary shipper on the airline as the freight forwarders were on CN Rail in the Cannet and Cottrell cases, supra.

BCL's Calgary operations, taken in isolation, would certainly constitute an interprovincial transportation undertaking solely on the basis of the regular and continuous trips made by its armoured cars to points in British Columbia. The evidence before the Board, however, shows that the Calgary branch office, all other branch offices, the regional offices, the special operations (air operation, tractor trailer operation), and the Canadian head office are all integrated components of the much bigger network which is the whole of BCL. Unlike the scant evidence in the Brink's decision, supra, the evidence presented to the Board in this case clearly establishes that the entire Canadian operation of Brink's Canada Limited is an indivisible interprovincial and international undertaking.

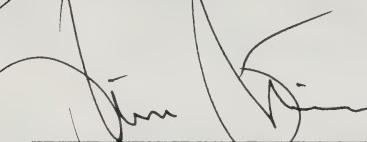
On the basis of the foregoing reasons, the Board finds that Brink's Canada Limited is a federal work, undertaking or business within the meaning of section 4 of the Code and therefore falls within the jurisdiction of this Board.



Hugh R. Jamieson
Vice-Chairman



J. Philippe Morneau
Vice-Chairman



François Bastien
Member of the Board

ISSUED at Ottawa, this 21st day of February 1992.

CLRB/CCRT - 918

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information

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SUMMARY

SYNDICAT DES EMPLOYES ET EMPLOYES PROFESSIONNELS-LES ET DE BUREAU, SECTION LOCALE 57, CTC-FTQ, APPLICANT UNION, AERO-PHOTO (1961) INC. AND TRANSPORTS AERO-2000 (1991) INC., EMPLOYERS, AND UNITED STEELWORKERS OF AMERICA, LOCAL 7708, BARGAINING AGENT, MIS-EN-CAUSE.

Board Files: 555-3344
560-279

Decision no.: 919

Canada Labour Code (Part I - Industrial Relations). Application for certification (section 24) for a group of a dozen employees working for two related companies. Section 35 (single employer declaration) raised by Board. Single employer declaration made. Certification issued.

The two companies are commonly owned and managed and share the same premises. Aero-Photo owns airplanes and specializes in aerial photography. One of their planes is also adapted for transport. Hence a second undertaking was created - Transport Aero in order to handle the transport business. There is a certain degree of mobility of staff and operations between the two companies, etc...

A simple certification under Section 24 cannot be issued for the employees of more than one employer. After having reviewed the evidence in light of the Code (Section 35), the Board found it appropriate to make a single employer declaration and to certify the union for a single bargaining unit.

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Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

RÉSUMÉ

SYNDICAT DES EMPLOYES ET EMPLOYES PROFESSIONNELS-LES ET DE BUREAU, SECTION LOCALE 57, CTC, FTQ, SYNDICAT REQUERANT, AERO-PHOTO (1961) INC. ET TRANSPORTS AERO-2000 (1991) INC., EMPLOYEURS, ET METALLURGIESTES UNIS D'AMERIQUE, SECTION LOCALE 7708, AGENT NEGOCIATEUR ACCREDITITE, MIS-EN-CAUSE.

Dossiers du Conseil: 555-3344
560-279

Décision n°: 919

Code canadien du travail (Partie I - Relations du travail) Demande d'accréditation (article 24) pour un groupe de douze employés de deux compagnies-sœurs. Article 35 (déclaration d'employeur unique) soulevé par le Conseil. Déclaration d'employeur unique faite. Accréditation émise.

La plupart des mêmes personnes possèdent et dirigent les deux compagnies et celles-ci partagent les mêmes locaux. Aero-Photo possède des avions et se spécialise dans la photo aérienne. Un de ses avions sert aussi au transport. On a donc créé à cette fin la société Transport-Aéro. Il y a une certaine mobilité du personnel et de services entre les deux, etc...

Une accréditation ordinaire (article 24) ne peut pas viser plus d'un employeur. Après avoir examiné la preuve et passé en revue les critères de l'article 35, le Conseil a jugé à propos de faire une déclaration d'employeur unique et d'accréditer le syndicat pour une seule unité de négociation.



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Canada
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Board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

Syndicat des employées et
employés professionnels-les
et de bureau, Local 57
(CLC-QFL),

applicant union,

and

Aéro-Photo (1961) Inc. and
Transports Aéro-2000 (1991)
Inc.,

employers,

and

United Steelworkers of
America, Local 7708,

*certified bargaining agent,
mis-en-cause.*

Board Files: 555-3344
560-279

The Board was composed of Mr. Serge Brault, Vice-Chairman,
and Ms. Evelyn Bourassa and Ms. Ginette Gosselin, Members.

Appearances

Mr. Serge Quesnel, for the Syndicat des employées et
employés professionnels-les et de bureau, Local 57,
accompanied by Ms. Laure Lapierre, union adviser; and

Mr. Richard Binet, for Transports Aéro-2000 (1991) Inc. and
Aéro-Photo (1961) Inc., accompanied by Mr. Michel Pigeon,
general manager of Transports Aéro-2000 (1991) Inc. and
president of Aéro-Photo (1961) Inc.

These reasons for decision were written by Mr. Serge Brault,
Vice-Chairman.

I

The Proceeding

These reasons for decision deal with an application for
certification filed on August 6, 1991 by the Syndicat des
employées et employés professionnels-les et de bureau, Local

57 (CLC - QFL) (hereinafter referred to as the applicant), seeking to represent a group of employees of Aéro-Photo 1961 Inc. and Transports Aéro-2000 (1991) Inc. (hereinafter referred to as Aéro-Photo and Aéro-2000 or collectively the employers). This applicant seeks to supplant the mis-en-cause union which, moreover, did not challenge the application.

The applicant is seeking in this case certification for a group of a dozen employees. This group comprises Aéro-Photo employees and includes one or two persons who worked at various times for Aéro-2000. Originally, the applicant did not seek a declaration of single employer (see section 35 of the Code at page 5 of these reasons). The Board itself raised this matter, although its initiative in this regard stems from the applicant's written submissions.

The parties agree on the description of the bargaining structure that would be appropriate, depending on whether the Board concludes that there is a single employer and a single bargaining unit.

Although this application dates back to August, it was not until mid-January that the Board received the report of the officer designated to investigate the application. It took advantage of a hearing held in a concurrent proceeding involving a complaint of unfair labour practice (745-4127) to review and decide the certification question in the parties' presence. This hearing took place in Québec on January 21 and 22, 1992. The Board publicly expressed surprise on this occasion that Serge Quesnel was appearing for the applicant because until a few weeks prior to this hearing, he worked for the Board as a labour relations officer. The employer, for its part, did not comment on this matter.

The only question really at issue here is the designation of the employers.

II

The Facts

The Board heard rather detailed evidence concerning the businesses of these employers and no purpose would be served by repeating it chapter and verse. The companies designated as employers are sister companies. Aéro-Photo specializes in aerial photography. It employs flight personnel, pilots, navigators and operators, as well as specialized laboratory technicians. The company owns four aircraft that have been modified for photography work. One of these aircraft is a turbine engine Commander 681. Originally a freight and passenger aircraft, the Commander 681 was modified for aerial photography after it was acquired last year. It thus has a dual role: transportation and photography. However, when this aircraft is used for transportation, Aéro-2000 operates it. It alone in fact holds the necessary operating authorities issued by Transport Canada. However, both companies hold the authorities necessary to provide the so-called "specialized" services: aerial survey, geophysical survey, aerial advertising and non-technical aerial photography. However, only Aéro-Photo holds the authority to do aerial photogrammetry.

The two companies occupy the same premises and have essentially the same shareholders. Michel Pigeon is the principal owner of the two companies. He is president of Aéro-Photo and general manager of Aéro-2000. Luc Gauvin, on his part, is crew manager for Aéro-Photo and a shareholder in this company and is president and operations manager of Aéro-2000.

Pilots work for both companies at various times. Inevitably the two companies co-ordinate the use of equipment and all their activities. They continually exchange services: office support, bookkeeping, etc., in addition to the training and development of personnel, maintenance, etc.

III

Arguments

The union representative argued that the conditions set down in section 35 were met in the instant case, noting in particular that senior management, administrative staff, equipment, including aircraft, offices and training personnel were common to both companies and that one company could not operate without the other.

Counsel for the employer argued that the interdependence of the two companies was intermittent only and that each had a different purpose. Aéro-Photo specialized in photography, whereas Aéro-2000 specialized strictly in charter transportation. While admitting that the two companies essentially had the same shareholders, the same owners and the same directors, counsel argued that the conditions set down in section 35 were not met. Regarding the interchangeability of employees, he acknowledged that some employees worked in turn for both companies, but noted that only when they were on standby at one company were they called upon to work for the other. These arrangements were made merely to accommodate personnel, and for no other reason.

IV

The Law

Section 35 of the Code stipulates the following:

"35. Where, in the opinion of the Board, associated or related federal works, undertakings or businesses are operated by two or more employers having common control or direction, the Board may, after affording to the employers a reasonable opportunity to make representations, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business."

Sections 24 and 27 of the Code set down the general conditions for certification where a single union seeks certification in respect of a single employer. However, sections 32 to 35 address special situations where several unions may seek to represent employees of several employers.

A declaration of single employer is made where there is a multiplicity of employers. Its purpose it to ensure that if, for labour relations purposes, the distinctions between employers or enterprises are merely apparent, they do not violate the basic freedoms recognized by the Code (see The Canadian Press et al. (1976), 13 di 39; [1976] 1 Can LRBR 354; and 76 CLLC 16,013 (CLRB no. 60); British Columbia Telephone Company and Canadian Telephones and Supplies Ltd. (1977), 24 di 164; [1978] 1 Can LRBR 236; and 78 CLLC 16,122 (CLRB no. 108); Emde Trucking Ltd. (1985), 60 di 66; and 10 CLRBR (NS) 1 (CLRB no. 501); and Murray Hill Limousine Service Ltd. et al. (1988), 74 di 127 (CLRB no. 699)).

Apart from the cases provided for in section 32 et seq., the Board does not see how the Code could sanction the inclusion of two employers in a single certification order. If the normal certification procedure allowed a bargaining agent to hold a single certification covering two employers, section 35 would cease to have any reason for being.

In Murray Hill Limousine Service Ltd. et al., supra, the Board reiterated the criteria that bring section 35 into play:

"In order for section [35] to apply, the following criteria must be met:

1. two or more enterprises, i.e., businesses,
2. under federal jurisdiction,
3. associated or related,
4. of which at least two, but not necessarily all, are employers (Emde Trucking Ltd., supra),
5. the said businesses being operated by employers having common direction and control over them."

(page 145)

Once these criteria are met, the Board then addresses the question of the appropriateness of making such a declaration. It will do so where bargaining rights are or may be jeopardized (see Murray Hill Limousine Service Ltd. et al., supra, and Air Canada et al. (1989), 79 di 98; 7 CLRBR (2d) 252; and 90 CLLC 16,008 (CLRB no. 771)).

v

Decision

As the CEO, Mr. Pigeon, explained in his testimony, in order to operate its own business, Aéro-Photo needed a turbine engine aircraft like the Commander 681. Moreover, it had leased this aircraft before, from Air Roberval. When its leasing contract expired, it purchased this aircraft. However, as Mr. Pigeon pointed out, since it was impossible to operate the turbine engine aircraft profitably through aerial photography alone, it became necessary to use it for other purposes, and hence the idea of operating a charter

service. The owners of Aéro-Photo therefore decided to create an affiliate to operate the Commander as a carrier.

Having regard to the criteria that bring section 35 in play, the Board notes that what in fact we have in this case is a multiplicity of federal enterprises, that these enterprises are associated and related, and that they are both employers. Finally, their businesses are under common direction and control since they have the same management, etc.

In practice, it is impossible to operate Aéro-2000 without Aéro-Photo and vice versa. In fact, Aéro-2000 has no equipment or office and almost no personnel of its own. It does in fact have a maintenance manager, but no equipment. Moreover, if Aéro-Photo needs the turbine engine aircraft, Aéro-2000 cannot continue to use it, and vice versa. This is Aéro-2000's only aircraft, and the company does not own it.

Having said this, the Board wishes to point out that in the end a declaration under section 35 always results from the Board exercising its discretion under the Code. This discretion must be exercised so as to promote sound labour relations that further the objectives of the Code. The Board had the following to say on this subject in The Canadian Press et al., supra:

"In addition to the criteria discussed above, there must be an evident purpose, in terms of industrial relations, for the Board to join together companies it finds related and under common direction and control. A declaration under Section [35] is not merely an academic exercise. The interest of the employees concerned and sound labour management relations must warrant a Board finding in this area."

(pages 45; 359; and 442)

On the same subject, the Board said this in British Columbia Telephone Company and Canadian Telephones and Supplies Ltd., supra:

"... Section [35] allows the corporate veil to be pierced for a fundamental purpose, namely preventing avoidance of responsibilities and undermining rights granted under the Code. ..."

(pages 179; 248; and 340)

There is a danger of this happening here, which could harm industrial peace. It is in everyone's interests that the labour relations of the employees assigned to the same equipment for different forms of air operations, as in this case, be integrated in the same way as the management of this business. Section 35 expressly provides that the corporate veil that separates companies be lifted and not impede sound labour relations.

Accordingly, the Board declares that Aéro-Photo and Aéro-2000 constitute a single employer within the meaning of section 35. This having been determined, the union has met the other conditions for certification set down in section 28. Specifically, there will be a single bargaining unit comprising the employees of two companies. An order to this effect, describing the unit agreed on by the parties, will therefore be issued.

Serge Brault
Serge Brault
Vice-Chairman

G. Gosselin
Ginette Gosselin
Member

Evelyn Bourassa
Evelyn Bourassa
Member

ISSUED at Ottawa, this 13th day of March 1992.

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SUMMARY

G. Lapointe, complainant, and Canada Post Corporation, Thetford Mines, Quebec, employer.

Board File: 950-185

Decision no. 920

In a complaint filed pursuant to section 133 of the Canada Labour Code (Part II - Occupational Safety and Health), the complainant alleges that his employer disciplined him for having invoked the right of refusal provided in section 128.

The employer raised a preliminary objection on the admissibility of the complaint.

The Board upheld the objection and concluded that, in the instant case, the complainant had not reported the matter in accordance with section 128(6). It found that the complaint was inadmissible since section 133(3) requires that an employee make such a report before filing a complaint.

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RÉSUMÉ

G. Lapointe, plaignant, Société canadienne des postes, Thetford Mines (Québec), employeur.

Dossier du Conseil: 950-185

Décision n° 920

Code canadien du travail (Partie II - Sécurité et santé au travail). Plainte portée en vertu de l'article 133. Le plaignant y allègue que son employeur a pris des mesures disciplinaires à son endroit parce qu'il s'était prévalu du droit de refuser de travailler prévu à l'article 128.

Objection préliminaire de l'employeur portant sur la recevabilité de la plainte.

Objection maintenue. Le Conseil décide qu'en l'espèce, le plaignant n'a pas présenté le rapport prévu au paragraphe 128(6). La plainte est irrecevable puisque le paragraphe 133(3) fait de ce rapport une condition préalable au dépôt d'une plainte.



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REASONS FOR DECISION

Gaetan Lapointe,
complainant,
and

Canada Post Corporation,
respondent employer.

Board File: 950-185

The Board was composed of Ms. Ginette Gosselin, Member, sitting as a single-member panel pursuant to section 156 of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances

Mr. Daniel Plouffe, union representative, Canadian Union of Postal Workers, and Mr. Michel Bergeron, union representative and technical assistant, for the complainant; and

Mr. Luc Jodoin, accompanied by Mr. Michel Bilodeau, Occupational Health, Safety and Environment Officer, and Ms. Johanne Gagnon, Labour Relations Officer, for the respondent employer.

These reasons for decision were written by Ms. Ginette Gosselin, Member.

I

The present complaint, which the Board received on March 14, 1991, was made pursuant to section 133 of the Canada Labour Code (Part II - Occupational Safety and Health). In this complaint, the complainant, Gaetan Lapointe, a letter carrier employed by Canada Post Corporation (CPC or the employer), alleges that his employer contravened section 147(a) of the Code by disciplining him for exercising his right to refuse to work. Mr. Lapointe refused to deliver

part of his mail on February 14, 1991 because he believed weather conditions posed a danger to his safety and health. He added that walking in heavy snow posed an additional danger to him because he has an abdominal hernia.

Mr. Lapointe was not paid for the time he did not work on February 14, 1991 and received a disciplinary notice.

Complaints of this kind can be made under the following provisions of the Code:

"133.(1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

...

147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

(i) has testified or is about to testify in any proceeding taken or inquiry held under this Part;

(ii) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the safety or health of that employee or any of his fellow employees, or

(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part; ..."

The employer asked that the complaint be dismissed for the following reasons.

1. The employee's letter to the Board did not constitute a complaint within the meaning of section 133(1).

2. The allegations made in this letter could not constitute a contravention of the Code because the complainant

(a) had not informed the employer that he was exercising his right to refuse under the Code; and

(b) had no reasonable cause to believe that a danger existed.

3. There was no danger within the meaning of the Code.

4. The objective pursued by the complainant involved labour relations matters and not the immediate protection of his safety.

Subsidiarily, CPC alleged that delivering mail under the conditions described by the complainant constitutes normal working conditions for a letter carrier. Finally, CPC added that the Canada Post Corporation Act, R.S.C., 1985, c. C 10, imposes on its managers and employees an obligation to deliver the mail under these conditions.

A hearing was held in Thetford Mines on July 11 and November 7 and 8, 1991. The Board granted the request, made by the complainant's representative when the hearing began, to exclude the witnesses.

Preliminary Objection

When the hearing began, counsel for CPC asked the Board to decide forthwith the admissibility of the complaint. He alleged that this complaint was inadmissible because the prerequisite for filing a complaint had not been met. He argued that because section 133(6) of the Code places the

burden of proof on the employer, the Board must require strict compliance with section 128(6) or 129(1), as the case may be. To decide otherwise would put the employer in a situation where it was incapable, owing to the complainant, of discharging this burden of proof.

The Board took this objection under advisement. It was necessary to hear a good part of, if not all, the evidence to be able to decide this objection, which it does later in these reasons.

The Facts

Mr. Lapointe has worked for CPC in Thetford Mines for 16 years, the last 14 as a letter carrier. In February 1991, he had been delivering mail on the same route for two and a half years. He has been a member of the safety and health committee for a number of years.

The Thetford Mines post office employs 18 full-time letter carriers to deliver mail on 18 routes for which it is responsible. It also employs three replacement letter carriers, as required, to cover absences by full-time letter carriers. The letter carriers report to André Lessard, supervisor, and Claude Bolduc, postal station manager. Both are former letter carriers.

A letter carrier's workday begins at the post office at 7:00 a.m. The letter carrier sorts the mail he will have to deliver and prepares the relay bags that are then transported to the relay boxes. These preparations take one and a half to two hours. The letter carrier then takes a taxi to the starting point of his morning route. Around 11:45 a.m., he returns to the post office by taxi. He is then entitled to take his one-hour meal break.

Mr. Lapointe, for his part, goes home for lunch by car. At 1:00 p.m., he is back at the post office where he checks the special mail that he may have to deliver in the afternoon. This check takes 5 to 10 minutes. He then goes by taxi to the starting point of his afternoon route, delivers his mail and returns to the post office by taxi. There, he puts any leftover mail back in his sorting case, punches out and leaves. It is not unusual for a letter carrier to return with mail because of inclement weather, a broken letter box, an aggressive dog, etc. The workday officially ends at 3:30 p.m., but it in fact varies depending on the amount of mail to be delivered and the conditions under which delivery is made. Mr. Lapointe generally completes his workday around 2:30 p.m. or 3:00 p.m. If a letter carrier finishes before 3:30 p.m., he is paid for a full day. If he has to work beyond 3:30 p.m., because he has not managed to deliver all his day's mail, he is then paid overtime.

The safety and health committee of the Thetford Mines post office comprises four members. Messrs. Lessard and Bolduc are the management representatives on the committee. The employee representatives are the complainant and Claude Lachance. Mr. Lapointe and Mr. Lessard, the supervisor of the letter carriers, together form what might be called the subcommittee on inclement weather.

None of these committees have established written procedures governing their operation. Nor are there any standards for assessing the dangers posed by bad weather conditions. Certain provisions of the letter carriers' collective agreement and a CPC publication for managers indicate that changes can be made to the service in case of inclement weather. However, not one of these documents is officially used to solve problems of this nature, other than the report

form that must be filed with CPC when there is an investigation of and changes to the delivery service.

The evidence revealed rather that when there is inclement weather or such weather is forecast, the members of the inclement weather committee meet, assess the situation and check conditions on the delivery routes firsthand if necessary. They then try and agree on changes to the delivery service where the weather requires such changes and, where necessary, will make recommendations to the letter carriers. Failing agreement, the matter is normally referred to the postal station manager. Changes to the delivery service may apply to all areas or be limited to certain areas, or may apply for part of the day only. They generally consist in suspending delivery of one or more classes of mail. Recommendations to the letter carriers may include the wearing of special footwear or clothing or a general warning to exercise caution and not to deliver mail to locations that they feel pose risks, for example, where a flight of stairs is snow- or ice-covered. The situation is reassessed as required and an earlier decision may be amended. Finally, the so-called continuous delivery procedure may also be applied. In accordance with this procedure, the letter carriers deliver all mail in one uninterrupted stretch, without returning to the post office at mealtime. The letter carriers eat on their route as they see fit.

These conditions are the same, in summer and winter alike. However, the work is often more difficult in winter because of inclement weather. For example, the sidewalks on certain streets are never plowed in winter. As a result, the letter carriers are often forced to walk on the road and their workday is frequently prolonged.

No employee at the Thetford Mines post office had exercised the right to refuse to work (without, however, characterizing the complainant's action as such for the time being) prior to February 14, 1991.

The State of the Complainant's Health

Mr. Lapointe has an inguinal hernia. On February 12, he had consulted a doctor who advised him to avoid straining himself. The complainant informed the supervisor, Mr. Lessard, of his condition during a general conversation they had. Neither remembers exactly when this discussion took place, but it was before February 14. Mr. Bolduc first learned of Mr. Lapointe's hernia problem at the interview on February 18. Mr. Lapointe did not provide a medical report on this occasion or in the ensuing days, nor did he ask to be assigned lighter work.

February 14, 1991

The complainant's testimony and that of the employer's representatives conflict regarding the major events of the day. We will first relate the complainant's version.

At 8:00 a.m. on February 14, supervisor Lessard called the complainant to his office and suggested that the letter carriers be asked to provide continuous delivery that day. It was then snowing lightly.

Mr. Lapointe objected. He felt that the weather at that point did not warrant this measure which would deprive the letter carriers of their meal break. They needed this break, especially in winter when their job was more difficult. Following this conversation, Mr. Lessard gave the letter carriers the option of delivering their mail

continuously. Some took him up on the offer. Mr. Lessard also told the letter carriers that they could postpone until the following day delivery of mail from Bell Canada where there was no other mail to deliver.

Mr. Lapointe delivered all his mail during the morning, including the mail from Bell.

After taking his meal break at home, he returned to the post office at 1:00 p.m. and asked to meet with his supervisor. He wanted them to reassess together the situation because snow had accumulated since the morning. He suggested that the afternoon delivery be limited to mail requiring a signature and to business mail. Mr. Lessard replied that the mail from Bell was scheduled for delivery that day and would go out. The conversation became somewhat louder and Mr. Lapointe accused his supervisor of ignoring the health of the workers. Mr. Lessard repeated that the mail had to go out. They both nevertheless left the post office and went and inspected part of the complainant's route. At that point, according to the complainant, the wind was blowing, some 20 centimetres of snow had fallen, the roads were icy, visibility was reduced because of blowing snow and only the centre lane of Ouellet Boulevard had been plowed. Upon returning to the post office, since there was no agreement, Mr. Lapointe prepared his afternoon mail and left around 1:30 p.m. to do his normal walk. After making some 10 deliveries on Ouellet Boulevard, he decided it was too dangerous to continue deliveries on this street because it was icy and he was forced to walk in the traffic lane. He delivered mail on two small streets and then returned to a major artery, Sauvageau Boulevard, where he made a few deliveries. Here too, he decided that it was too dangerous to continue deliveries because the street had not been

plowed and the traffic was quite heavy. Moreover, his hernia was bothering him because he had to step over small snowdrifts. He therefore went to the place from where he takes a taxi to return to the post office in the afternoon. He waited approximately 10 minutes for a taxi and was back at the post office around 2:00 p.m. He estimated that he made some 50 deliveries that afternoon.

While he was putting the undelivered mail back in his sorting case, Mr. Lessard came and asked him, as he always does, what mail he had brought back. The complainant replied that he had brought back mail for Ouellet and Sauvageau boulevards because there was a danger to his safety and health and that he was exercising his right to refuse to work. Mr. Lessard then told him that he would discuss the matter with Mr. Bolduc, the postal station manager, who would make a decision. The complainant finished sorting the mail, punched out and left the post office around 2:30 p.m.

The next morning, he received a notice of a disciplinary interview that took place the following Monday.

Mr. Lapointe was surprised at being summoned to a disciplinary interview. In the past, he had on occasion brought back mail without any action being taken. Other letter carriers also brought back mail on February 14, but no punitive action was taken against them. He left work that day because Mr. Lessard did not order him to remain. Since he did not know of the provisions of the Code dealing with the exercise of the right to refuse to work, he also did not know that he was required to remain at the post office for the investigation. At the hearing, Mr. Lapointe pointed out that it was now much more difficult than it had

been in the past to reach an agreement with CPC representatives on changes to the delivery service during inclement weather.

Mr. Lessard's version differed from Mr. Lapointe's on certain points.

According to Mr. Lessard, during the morning meeting, he suggested to Mr. Lapointe that the decision to provide continuous delivery be left to each letter carrier individually. The complainant replied that as a union representative, he could not accept this suggestion, but that he had no objection if the decision was really left to the letter carriers. Then, they both reported on their discussion to the letter carriers who had assembled in the sorting room. Mr. Lessard maintained that it was not on February 14, but on the following day, that he proposed that the letter carriers not deliver the mail from Bell.

At 1:00 p.m. on February 14, he was surprised by the complainant's request that mail delivery be altered because of the weather. In his opinion, this was not a major storm. It was snowing moderately and the wind was blowing. He nevertheless inspected the delivery routes by car firsthand, accompanied by the complainant. This inspection was cut short at the complainant's request when he realized that, for all practical purposes, an agreement was impossible. In his written report to CPC following the on-site inspection, the witness stated that as of 1:00 p.m., 10 centimetres of snow had fallen, the winds were light and visibility was fair. The report also stated that regular service was being maintained and that the union representative disagreed with this position.

Around 2:00 p.m., when Mr. Lessard saw the complainant sorting mail, he asked him what mail he had brought back and why. Mr. Lapointe replied that he had not delivered on Sauvageau and Ouellet boulevards because he was afraid of being hit by cars. He further explained that Ouellet Boulevard had been plowed, that the surface of the road was snow-covered and slippery and that Sauvageau Boulevard had not been plowed, which made pedestrian traffic dangerous because of the curves. Mr. Lessard then told the complainant that he would discuss the matter with the boss and would determine with him the decision to be taken. This he did immediately. Mr. Bolduc, the postal station manager, suggested to him that he go back and see the complainant and ask him to continue his delivery. However, when Mr. Lessard returned to the letter carriers' room, Mr. Lapointe had already left. Mr. Lessard estimated that the complainant's undelivered mail represented about an hour's work.

Mr. Bolduc then decided that a replacement would be asked to finish delivering the mail on Mr. Lapointe's route. Mr. Lessard then drove the replacement in his car to the delivery area. He took this opportunity to inspect the area. He noted that Ouellet Boulevard had been plowed and that its surface was snow-covered and icy. He measured with his hand the bank of snow deposited on each side of the street by the snowplow. Each bank was some seven to eight inches high. On the sidewalks and in the driveways leading to the houses where there had not yet been any snow removal, the snow was four to five inches deep. Mr. Lessard also inspected Sauvageau Boulevard. He noted that this street had not been plowed and that four to five inches of snow had accumulated. In the two locations, the wind was gusting and he estimated that he could see 20 to 25 houses in the distance.

When he returned to the post office, he prepared, at Mr. Bolduc's request, the notice summoning Mr. Lapointe to the disciplinary interview. He did not speak to the complainant again that day. Moreover, he did not telephone Labour Canada. He did not know that Mr. Lapointe considered his action a refusal to work within the meaning of the Code. He only heard of a refusal to work the next day when he gave the notice to the complainant. It was another employee, Daniel Plouffe, a union representative for the Thetford Mines post office, who spoke up and told him that Mr. Lapointe should not be subjected to the disciplinary procedure because the action he took the previous day constituted the exercise of a right under the Code. Later that day, Mr. Lessard telephoned Labour Canada. An officer explained to him the procedure to follow where an employee refused to work for safety and health reasons.

The disciplinary interview took place on the following Monday, February 18. Mr. Plouffe accompanied the complainant. Messrs. Bolduc and Lessard represented the employer. The complainant was asked why he had not delivered the mail on Ouellet and Sauvageau boulevards on February 14 and how that day was different from February 15 or any other day. Mr. Lapointe explained: snow, blowing snow and slippery streets had made his work dangerous. He also cited his physical condition (his hernia problem) to justify his action. Mr. Lapointe also complained that for some time, it had been much more difficult for the committee on inclement weather to reach an agreement.

Messrs. Bolduc and Lessard wanted to end the interview after questioning the complainant, but Mr. Plouffe intervened to point out the right-to-refuse provisions of the Code. He

tried to focus the discussion on this topic, but Messrs. Bolduc and Lessard objected. Mr. Bolduc did not see its relevance.

The testimony of Mr. Bolduc, the postal station manager, corroborated Mr. Lessard's testimony concerning the interview, but differed somewhat from the latter's testimony regarding the discussions they had on the afternoon of February 14. According to Mr. Bolduc, the complainant had already left when the supervisor came to consult him regarding the action to be taken. Mr. Bolduc asked the supervisor to take steps to have the mail delivered, if this was possible. Later that afternoon, Mr. Lessard reported to him on his initiatives. After the supervisor informed him that conditions on Ouellet and Sauvageau boulevards were the same as those elsewhere in the city, the witness asked him to prepare the disciplinary interview notice.

Following the interview, Messrs. Bolduc and Lessard concluded that Mr. Lapointe's refusal to deliver part of his mail on the afternoon of February 14 was not justified. In reaching this conclusion, they took into account his experience, the work done by the other letter carriers on the 14th, the fact that he had not delivered mail to whole sections of streets, as opposed to missing the odd house, as happens in inclement weather, and the fact that the schools remained open that day. They then decided to discipline the employee primarily to prevent further actions of this kind.

Gérard Royer, an observer at the Thetford Mines weather station for 13 years, also testified. During that period, he had taken readings twice a day for the Ministry of the Environment and produced a weekly report for the Meteorology Branch. His report for the week of February 10, 1991

indicated that on Thursday, February 14, it began snowing at 8:00 a.m., that by 6:00 p.m. 11 centimetres had fallen and that the sky was overcast all day. The report also indicated that at 8:00 a.m., the wind velocity was 18 km/h, that there was no blowing snow and that visibility was good, whereas at 6:00 p.m., the wind velocity was 40 km/h, there was blowing snow and visibility was zero. To determine visibility, Mr. Royer uses a standard of 150 feet. The witness recalled February 14, 1991. In the afternoon, using his snow removal equipment, he had cleared the yards and entrances of homes or businesses in Thetford Mines. According to him, there was quite a storm on the afternoon of February 14.

Michel Grégoire, manager of Public Works at Thetford Mines, testified by affidavit, with the complainant's consent. The relevant parts of his testimony are the following:

"3 - On or about February 14, 1991, a snowfall began, necessitating the clearing of the streets and boulevards in Thetford Mines.

4 - If particular problems arise on these occasions, we make note of them.

5 - No particular problem was noted on February 14, 1991 in the case of Sauvageau Boulevard and it was noted that the sidewalk was plowed on Ouellet Boulevard during the night of February 14 to 15, 1991.

6 - Snow removal therefore proceeded normally, beginning with the main traffic arteries such as Ouellet Boulevard and finishing with the secondary arteries.

7 - As a rule, during snow removal, priority is given to clearing the streets; the sidewalks can be done a little later.

8 - The sidewalks on Sauvageau Boulevard are generally not plowed during the winter.

9 - Moreover, a number of sidewalks in the municipality cannot be plowed, as they are in a number of other municipalities.

10 - This means that people have to walk on the edge of the roadway."

(translation)

The Positions of the Parties

Counsel for the employer reviewed and elaborated on the arguments supporting his preliminary objection.

In placing the burden of proof on the employer in section 133 complaints, the Code must, at the very least, in return require the complainant to observe the letter and spirit of the right-to-refuse provisions. Because the employee did not have to prove what he alleged, he must have clean hands. The employee must not, through his conduct, put the employer in a position where it was unable to discharge its burden of proof.

In the instant case, the complainant did not comply with either the letter or the spirit of the Code. He did not even inform the employer of his refusal. It was Mr. Lessard who asked the complainant to explain why he had brought back mail. Mr. Lapointe then left on his own initiative. By leaving, he made it impossible to conduct an investigation that could have settled the matter or placed it in the hands of a Labour Canada safety officer. His leaving also made it impossible to reassign him to other duties otherwise permitted by the Code. Finally, his leaving removed him from any danger. The danger to which he refused to expose himself was not present inside the post office. It was snowing and blowing outside. By leaving in these circumstances, more than an hour before the end of the workday, Mr. Lapointe was no longer protected by the Code. He had simply unilaterally breached his contract of employment, thereby leaving himself open to disciplinary action.

Counsel for CPC argued subsidiarily that the complainant had no reasonable cause to believe that the work place posed a

danger to his safety or health. He was an experienced letter carrier. He saw how other letter carriers reacted to the weather conditions. No other letter carrier behaved as he did that day. The testimony heard, with the exception of his, did not reveal the existence of any situation that posed a danger. Moreover, the fact that the responsible authorities had not even deemed it necessary to close the schools that day was telling evidence. The truth was that Mr. Lapointe was angry and wanted to show that he could challenge his employer. His behaviour that day would support no other conclusion.

Finally, as another ground for dismissing the complaint, counsel argued that the situation that existed on February 14, while unpleasant, was not abnormal. This situation was inherent in a letter carrier's job and Mr. Lapointe therefore could not invoke his right under the Code to refuse to work that day.

The complainant's representative, for his part, argued that Mr. Lapointe refused to work in accordance with the Code: he made a report to his employer as required by section 128(6). He added that Mr. Lapointe's broad experience, both as a letter carrier and as an employee representative on the safety and health committee, made him fully capable of recognizing situations that posed a danger. Moreover, the evidence revealed that on the day in question, the complainant had reasonable cause to believe that weather conditions posed a danger to him, not to mention the fact that continuing to work in these conditions could aggravate his health problems.

The complainant's representative argued, finally, that the employer did not discharge the burden of proof, but admitted

having disciplined the complainant because he had refused to deliver the mail.

Decision on the Preliminary Objection

The employer, as we have seen, alleges in the instant case that the complaint is inadmissible because the complainant did not meet the prerequisites for filing the said complaint.

The relevant provisions of the Code are the following:

"133.(1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

...

(3) An employee may not make a complaint under this section if the employee has failed to comply with subsection 128(6) or 129(1) in relation to the matter that is the subject-matter of the complaint.

...

(6) A complaint made pursuant to subsection (1) in respect of an alleged contravention of paragraph 147(a) by an employer is itself evidence that the contravention actually occurred and, if any party to the complaint proceedings alleges that the contravention did not occur, the burden of proof thereof is on that party."

* * * * *

"122.(1) 'danger' means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected."

* * * * *

"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place.

...

(6) Where an employee refuses to use or operate a machine or thing or to work in a place pursuant to subsection (1), or is prevented from acting in accordance with that subsection pursuant to subsection (4), the employee shall forthwith report the circumstances of the matter to his employer and to

(a) a member of the safety and health committee, if any, established for the work place affected;

...

(7) An employer shall forthwith on receipt of a report under subsection (6) investigate the report in the presence of the employee who made the report and in the presence of

(a) at least one member of the safety and health committee, if any, to which the report was made under subsection (6) who does not exercise managerial functions;

(b) the safety and health representative, if any; or

(c) where no safety and health committee or safety and health representative has been established or appointed for the work place affected, at least one person selected by the employee.

(8) Where an employer disputes a report made to the employer by an employee pursuant to subsection (6) or takes steps to make the machine or thing or the place in respect of which the report was made safe, and the employee has reasonable cause to believe that

(a) the use or operation of the machine or thing continues to constitute a danger to the employee or to another employee, or

(b) a condition continues to exist in the place that constitutes a danger to the employee,

the employee may continue to refuse to use or operate the machine or thing or to work in that place.

129.(1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the

employer and the employee shall each forthwith notify a safety officer, and the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee or the employee's representative."

Relying on section 133(6) which places the burden of proof on the employer, counsel for CPC is asking the Board to assess the circumstances of the presentation of the report provided for in section 128(b) or 129(1) to determine whether the complainant's attitude prevented it from discharging this burden of proof.

The Board wishes to point out immediately that the report provided for in section 128(6)(a) is not at issue because Messrs. Lapointe and Lessard are members of the safety and health committee (see in this regard VIA Rail Canada Inc. (1989), 78 di 211 (CLRB no. 761)). The Board also notes that it cannot be a question here of merely observing section 128(6). Although the employer also referred to section 129(1), no one argued - and the facts would not support such an argument - that upon his return to the post office around 2:00 p.m., Mr. Lapointe continued to exercise the right to refuse to work that he had invoked earlier.

The relevant provisions of the Code clearly reveal that it is the report that the employee makes to his employer and to a member of the safety and health committee that triggers the whole process that must lead to the resolution of the problem and that will guarantee him the protection of the Code, if warranted. This report is more than a mere administrative detail; it is the concrete expression of the refusal to work because it gives substance to an employee's decision not to work under certain conditions because he believes that a danger exists. This is why section 133(3) provides that the making of a report is a prerequisite for

filling a complaint. The Board has repeatedly said that in order for this report to comply with both the spirit and letter of the Code, it need not be formal and detailed, provided it is clear that the employee is refusing to work for safety reasons (see William Gallivan (1981), 45 di 180; and [1982] 1 Can LRBR 241 (CLRB no. 332); Roland D. Sabourin (1987), 69 di 61 (CLRB no. 618); and John Charters et al. (1989), 76 di 188; and 3 CLRBR (2d) 253 (CLRB no. 727)). Each time, then, the issue of the report is raised, the Board must analyse the circumstances of the refusal to work and the manner in which this right is exercised in order to determine whether the employer was able to understand what was involved. Once it has understood, it must proceed to the next step.

In the instant case, an analysis of the evidence leads us to conclude that the complainant did not make the report required by the Code and case law.

Even if we accept Mr. Lapointe's version of the facts, we can only conclude that on the afternoon in question, the complainant, who had never before exercised the right to refuse to work, simply followed his normal procedure when he brought back mail for one reason or another. He put this mail in his sorting case, answered the questions the supervisor came and asked him, punched out, and left. He explained his action only at the supervisor's initiative and left without waiting until the supervisor consulted the postal station manager. Moreover, before he left, he did not try and invoke the procedures with which he was very familiar and which were put in place by the safety and health committee precisely to alleviate the kind of danger he says he feared that day. In these circumstances, we cannot conclude that the complainant's conversation with the

supervisor constitutes the report required by section 128(6).

Invoking safety concerns is not in itself sufficient to authorize an employee to leave a work place that does not pose a danger, as Mr. Lapointe did. This is not the purpose of the report provided for in section 128(6). This report is part of the process of consultation and investigation established by Part II of the Code and must lead to the search for solutions to the problem raised. The Code, moreover, requires that the employer conduct the investigation forthwith in the presence of the employee making the report. Mr. Lapointe should have remained at his employer's disposal on the day in question in order to be entitled, if warranted, to file a complaint with the Board.

For these reasons, we allow the preliminary objection raised by CPC and dismiss the complaint.

G. Gosselin

Ginette Gosselin
Member

ISSUED at Ottawa, this 16th day of March 1992.

CCRT/CLRB - 920

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Summary

STEPHEN BRAILSFORD,
COMPLAINANT/APPLICANT, AND
WORLDWAYS CANADA LTD.,
EMPLOYER.

Board File: 950-177

Decision No.: 921

These reasons deal with a referral of a safety officer's decision to the Board pursuant to section 129(5) of Part II of the Canada Labour Code (Occupational Safety and Health).

A flight attendant refused to work because he believed that defective braking and locking mechanisms on 6 out of 18 service trolleys posed a hazard that could place himself and his fellow workers in imminent danger.

A safety officer from Transport Canada investigated the matter and found that such a situation did not constitute a danger within the meaning of the Code. The safety officer's decision was based on Transport Canada's definition of carts considered to be "in use" and on the assumption that there was sufficient non-critical locations on the aircraft to store the non-serviceable carts.

After hearing the evidence, the Board determined that it was satisfied with the safety officer's finding and upheld the decision.

Ce document n'est pas officiel. Les motifs de décision seulement peuvent être utilisés aux fins légales.

Résumé de décisions

STEPHEN BRAILSFORD,
PLAIGNAT/REQUÉRANT, ET
WORLDWAYS CANADA LTD.,
EMPLOYEUR.

Dossier du Conseil: 950-177

Décision n°: 921

Les présents motifs portent sur le renvoi de la décision d'un agent de sécurité au Conseil aux termes du paragraphe 129 (5) du Code canadien du travail (Partie II - Sécurité et santé au travail).

Un agent de bord a refusé de travailler parce qu'il croyait que les mécanismes de freinage et de blocage de 6 des 18 chariots à desserte posaient un risque qui pourrait placer ses collègues et lui-même dans une situation de danger imminent.

Un agent de sécurité de Transports Canada a fait enquête et a jugé que la situation ne constituait pas un danger au sens du Code. La décision de l'agent de sécurité se fonde sur la définition de chariots «en usage» et sur la présomption qu'il y avait suffisamment d'endroits dans l'avion pour ranger les chariots qui n'étaient pas en bon état.

Après avoir entendu la preuve, le Conseil s'est dit satisfait de la décision de l'agent et l'a confirmée.



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Reasons for Decision

Stephen Brailsford,
complainant/applicant
and

Worldways Canada Ltd.,
employer.

Board File: 950-177

The Board was comprised of Ms. Mary Rozenberg, sitting as a single member quorum pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances:

Ms. Amber Hockin-Jefferson, Chairperson, Division Health and Safety Committee, CUPE, and Ms. Tassia Rakkas, Component President, Local 4024, CUPE, for the complainant;

Mr. Donald Gray, counsel for the employer; and Mr. Howard G. Carter, Mr. Howard G. Carter, Safety Officer, Aviation, Occupational Safety & Health, replacing Mr. Ian Shimmin.

Heard at Toronto, October 21 and 22, 1991

I

These reasons deal with the referral to the Board of a safety officer's decision under section 129(5) of the Code, which reads as follows:

"129.(5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not

entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."

The referral arose from a refusal to work by Stephen Brailsford on September 6, 1990 and a subsequent investigation by safety officers Howard Carter and Ian Shimmin. Safety officer Shimmin advised Mr. Brailsford as follows: "As the investigation revealed, service carts are secure on the galley mushroom even if the brakes are defective, thus not presenting a hazard. Therefore, the decision of the undersigned Safety Officer is to no longer continue supporting the refusal."

The union requested that the safety officer's decision be referred to the Board. Stephen Brailsford authorizing his union, CUPE, to act on his behalf brought the refusal request within the requirements contemplated by the Code.

The Board received the referral on January 7, 1991. The case was to be heard on April 5, 1991. However, the union requested an adjournment on two separate occasions. The Board granted both requests, and the matter was heard in Toronto on October 21 and 22, 1991.

Although counsel for the employer attended part of the hearing, no evidence or argument was tendered on behalf of the employer.

II

On September 6, 1990 Stephen Brailsford, a flight attendant on flight 820 from Toronto (Halifax stopover) to Amsterdam, was scheduled to work the #10 position in the lower galley on an L1011 aircraft. (He returned from Amsterdam on Sunday, September 9, 1991.)

He followed checking procedures for the lower galley and found that the braking and locking mechanisms on 6 out of 18 service trolleys were defective. He believed that they posed a hazard that could place him and his fellow workers in imminent danger. He felt that the service trolleys (or carts) were unsafe because they were free to move in one or both directions when the braking mechanism was depressed or because they failed to be released from the floor-mounted mushrooms when the release pedal was depressed. The defective brake pedal mechanism also controls a cart's release from a floor-mounted mushroom. He believed that the braking mechanism was the same as the locking mechanism and the cart could release itself and not stay secure on a mushroom. He stated that the carts were not braking and he did not want to use a cart or want another crew member to use a cart that could not be safely stopped. In his opinion, a cart that could not be safely stopped and a cart that could not be removed from a mushroom could each present a danger.

Stephen Brailsford explained that when the brake actuator pedal on some trolleys was depressed or engaged, some trolleys moved either in one or both directions creating a hazard: an uncontrollable trolley could move on its own accord in the galley and in the cabin. Additionally, when placed in a mushroom with the

brake actuator depressed, some trolleys would stick and/or remain on the mushroom even when pushed, creating a situation where the trolley could block emergency equipment at the galley level or an emergency exit at the cabin level.

A cart stuck on a mushroom at certain places on an aircraft is more critical than others. In a galley, there is not much room to manoeuvre, and in an emergency situation, time and access to emergency and first aid equipment which are behind service trolleys in the lower galley are critical. Access is not possible without moving these carts; that is why defective carts should not be boarded onto an aircraft. This could become a dangerous situation. This situation is different from the situation of a cart becoming unserviceable during a flight when the focus becomes where to put the defective cart for the duration of the flight.

Mr. Brailsford contacted Inflight Service Manager (ISM) Denise Gijbels, informed her of the defective brakes and locking mechanisms, and requested that the six defective carts be removed from the flight and replaced with serviceable trolleys. CARA, the food service company responsible for the trolleys, advised that they had no replacement trolleys available. Alternative arrangements were suggested by Mr. Brailsford and discussed with the ISM, but those suggestions were not acted upon.

Ms. Gijbels left Mr. Brailsford in the galley. Upon her return to the galley, she showed Mr. Brailsford a memo addressed to ISM's dated August 29, 1990 from Lyle Gibson, Vice-President, Inflight Services. After reading the first page, Mr. Brailsford reiterated his

concerns about the defective trolleys. The ISM then requested that he meet with Captain Rittinger in the flight deck. Mr. Brailsford explained to the captain and the engineer his reasons for refusing to work with the defective trolleys and again offered the same alternative suggestions.

Mr. Brailsford testified that when he spoke with the flight deck crew, he was satisfied with their explanation that the faulty braking mechanism was independent of the locking mechanism even though the same pedal is used and with the engineer's description of how the mechanism operated; he was also satisfied that these carts would not fly off the mushroom. Mr. Brailsford was also subsequently satisfied on September 19, 1990 when an investigation was undertaken by the safety officers and the OH&S Committee.

Reading Mr. Gibson's memo a second time, this time in its entirety, had a significant impact on Mr. Brailsford because he felt that his job was threatened. The threat was very real because he had been fired from Worldways on two previous occasions and he thought that a similar scenario would present itself if he continued to refuse to work.

He decided to work the flight provided he continue to work the galley position to ensure that the defective trolleys would not be used by other flight attendants during the flight and he be given a copy of the Gibson memo (which was given upon arrival at Amsterdam) to provide to the OH&S Committee. Mr. Brailsford did not feel that he was in any position to offer any further alternatives because of the threat contained in the memo.

On September 10, 1990, safety officer Ian Shimmin was notified by CUPE representative Amber Hockin-Jefferson, of Stephen Brailsford's refusal and that Brailsford was continuing to exercise his right to refuse. Safety officer Shimmin requested that the registration of refusal forms be filled out and sent in. This was undertaken (on behalf of Stephen Brailsford) by Ms. Hockin-Jefferson.

In the afternoon of September 10, 1990, Ms. Hockin-Jefferson again called the Transport Canada office to speak with Mr. Shimmin to confirm that he had received the registration form and worker's report and to inquire as to a convenient time for investigation. Since Mr. Shimmin was not in the office at the time. Howard Carter took the call and indicated his interest in the case whereupon Ms. Hockin-Jefferson outlined Mr. Brailsford's case. He told her that it did not sound like Mr. Brailsford had exercised his right to refuse. Ms. Hockin-Jefferson reiterated what she understood had happened and explained that Mr. Brailsford had in fact exercised his right to refuse because he felt he was threatened by Mr. Gibson's memo.

The union and Mr. Brailsford maintain that Mr. Brailsford attempted to continue to exercise his right to refuse but was coerced into not completely removing himself from danger because of the contents in Mr. Gibson's memo. After his suggestions were turned down, Mr. Brailsford would have removed himself from the work place if he had not read that memo. Instead, Mr. Brailsford chose to work to minimize the danger.

III

On September 12, 1990, Ian Shimmin contacted Ms. Hockin-Jefferson and asked her to attend a meeting with Ricardo Nono, the newly appointed local safety and health chairperson, and Stephen Brailsford, scheduled for September 13 at 1:00 p.m. at the Worldways office.

On the morning of September 13, 1990, safety officers Ian Shimmin and Howard Carter visited the Worldways hangar at Pearson Airport to familiarize Howard Carter with the carts because, unlike Shimmin, Mr. Carter did not know how the carts worked. They were met by Brian Blackman who showed them the service carts that were being repaired under his supervision.

At 1:00 p.m. on September 13, 1990 a meeting was held in the Worldways boardroom. In attendance were Lyle Gibson, Ricardo Nono, Amber Hockin-Jefferson, Stephen Brailsford, Howard Carter and Ian Shimmin. Mr. Gibson objected to Ms. Hockin-Jefferson's presence as he did not consider the subject matter of the meeting to be a CUPE matter. Ms. Hockin-Jefferson indicated that she was present only to assist Ricardo Nono who was new to the proceedings. She handed out an additional inquiry report to provide background material to the safety officers regarding the trolley problem and attempted to establish the problem areas. Mr. Brailsford explained what happened on September 6, 1990. The meeting was ended abruptly by Ms. Hockin-Jefferson, after discussions between Mr. Gibson and Mr. Brailsford failed. Ms. Hockin-Jefferson, Mr. Brailsford and Mr. Nono left the meeting. Safety officers Carter and Shimmin and the others remained. Mr. Gibson was advised

by safety officer Carter that the investigation would continue with an inspection of carts aboard an L1011 aircraft at the next available time whereupon the investigation should include the OH&S Committee rather than management and union.

On September 19, 1990, Mr. Carter and Mr. Shimmin along with Stephen Brailsford, Kallin March, Worldways representative, and Tassia Rakkas, OH&S representative, were in attendance. An L1011 was in for service. The group went aboard to inspect the service cart storage facilities and the underside of the cart and the locking mechanism.

IV

Safety officer Shimmin was the original officer assigned to investigate Mr. Brailsford's work refusal. Safety officer Carter was also present during the entire investigation of Mr. Brailsford's refusal and has replaced Mr. Shimmin as the investigating officer on the case.

Mr. Carter testified that he really did not consider this incident a work refusal, because Mr. Brailsford did not continue to exercise his right to refuse after speaking to the flight engineer; he worked the flight. At that time, Transport Canada was on a learning curve. With what Transport Canada knows now, we would not have investigated Mr. Brailsford's refusal as a refusal to perform unsafe work.

The investigation revealed that the braking mechanism and the locking mechanism on the mushroom device had completely separate functions and were mechanically

separate, and that the only common denominator for the two is the pedal that releases the brakes and the mushroom device.

On the flight in question, the solution proposed by the company for the service carts with unserviceable brakes was to lock those carts on mushroom in the lower galley and to use them solely for storage purposes. A disagreement arose with respect to the interpretation given to the words "in use". The union contends that even if the cart is being used as a storage tray, then that tray is considered to be "in use".

According to Transport Canada, to be considered "in use", a cart must be used in the manner for which it was intended, that is to transport food and various other commissary items to serve passengers at their seats. As long as the carts remained locked on the mushroom and were not moved, they could be used solely for storage purposes and they did not constitute a hazard because they were not "in use". If they were to be moved from the mushroom at any time and for any reason, the cart would then have to be considered to be "in use" by Transport Canada.

This issue stems from a previous issue dealt with by this Board (Amber Hockin-Jefferson (1990), as yet unreported CLRB decision no. 816). Both Mr. Shimmin and Mr. Carter investigated that refusal. In attempting to solve the matter, Mr. Carter suggested that Mr. Gibson and the OH&S Committee work out a procedure should a dispute arise relating to the serviceability of an aircraft or any of its components prior to departure, "bearing in mind that airworthy goes beyond being safe enough." This issue has been a chronic problem between

the company and the flight attendants. The question of how many unserviceable carts could be tolerated onboard various aircraft was left to be solved through the OH&S Committee. Transport Canada never heard back from the OH&S Committee on this matter.

Mr. Carter testified that Mr. Gibson's memo addressed to ISM's and dated August 29, 1990, which arose from supra, Amber Hockin-Jefferson, contains a few errors; for example, after reading the memo, it could leave one with the impression that anyone who exercised their right to refuse over the issue would be disciplined. He advised Mr. Gibson that his memo was improper. Mr. Gibson then issued a subsequent memo dated September 24, 1990.

Statements from flight engineer Herman Ricardo dated October 3, 1990 and from ISM Gijbel dated October 4, 1990 were submitted to the attention of safety officer Shimmin. Herman Ricardo's statement indicated that both he and captain Rittinger explained to Stephen Brailsford that on the meal trolleys, there are two separate and independent mechanisms: one for the brake, and the other for locking and unlocking the trolley into the mushroom. Provided that the trolleys stayed in the lower galley and locked onto the mushrooms, it was safe to use the trolleys.

Argument

Amber Hockin-Jefferson acting as representative for Stephen Brailsford stated that Mr. Brailsford exercised his right to refuse for three reasons.

- (1) Trolleys had defective brakes; when the brake actuator pedal was depressed, the cart was not held

in place as designed; it moved in either one or both directions.

- (2) Some trolleys stuck on mushrooms and could not be removed.
- (3) Mr. Brailsford believed that trolleys with defective brake actuators could come off the mushroom without warning.

Because the procedural validity of Mr. Brailsford's refusal has been questioned by the safety officer, we feel we must review the processes in question. Issues concerning procedure that have been raised are the following.

- (1) Did Stephen Brailsford exercise his right to refuse?
- (2) Was Stephen Brailsford in imminent danger when he exercised his right to refuse considering that the aircraft was on the ground and the carts were locked on mushrooms at the time of his refusal?
- (3) Did Stephen Brailsford continue to exercise that right in accordance with the provisions set forth in section 128(1) of the Code?

Counsel requested that the Board closely examine the circumstances surrounding Stephen Brailsford's refusal when dealing with the first question.

Mr. Brailsford did exercise his right to refuse unsafe work. His suggested alternatives were turned down by his employer's representatives (ISM Gijbels and flight captain Rittinger). Although Mr. Brailsford was satisfied with flight engineer Ricardo's explanation, he continued to feel that the defective braking mechanisms and the fact that trolleys were sticking to mushrooms could create a significant danger in his work place.

Mr. Brailsford was sufficiently affected by Mr. Gibson's memo that in his mind, he had no alternative but to work on the flight with the defective trolleys. Mr. Brailsford's case is one that points up the difficult situation a worker must face when left with the option of protecting either his safety or his livelihood.

Counsel for the union equated Mr. Brailsford's position to that of a pilot who during his mandated inspection prior to every departure finds a tire with worn and uneven treads. The pilot knows that if the tire is not replaced prior to departure, there could be disaster on take-off, and the crew and the occupants in the aircraft would be in imminent danger. Stephen Brailsford conducted his pre-flight check and found six defective trolleys. He considered these trolleys dangerous because his experience and his training had taught him to know when a piece of equipment can be dangerous and when that piece of equipment could cause injury, just like the pilot and the tire. Counsel referred to Bell Canada (1984), 56 di 150 (CLRB no. 469), where perception is equated to knowledge, a similar situation to Stephen Brailsford's; knowledge that defective trolleys could put him in imminent danger.

According to counsel, the main issues of Mr. Brailsford's refusal were not addressed by the safety officer in his decision. Perhaps Transport Canada's learning curve at the time provides an explanation. Another factor may have been the length of time between the refusal on September 6, 1990 and the decision rendered on December 20, 1990. The real question before the Board is the safety officer's decision that defective trolleys can be placed onboard

an aircraft so long as they are not "in use". Mr. Carter stated that if trolleys are to be "in use" onboard an aircraft, they must have serviceable brakes. In reality, why would an employer want to put trolleys onboard unless it intended to use them or have them "in use". Therefore, Counsel argued, the safety officer's decision to allow trolleys with faulty braking mechanisms could create a dangerous situation. Accessibility to emergency equipment, procedures for firefighting and the requirement to gain access to service supplies necessitate the movement of trolleys, including any defective trolleys, in the lower galley. If a trolley becomes unserviceable during flight, then flight attendants must respond by limiting the use of that trolley to the best of their ability. This would be a recognized inherent risk. However, defective trolleys found onboard prior to departure where service carts are available can be replaced, thus removing any unnecessary danger. (What about the situation where service carts are not available or where non-defective service carts are not available?)

Counsel referred to David Pratt (1988), 73 di 218; and 1 CLRBR (2d) 310 (CLRB no. 686), where imminent danger has been defined as a threat of injury to safety or health that is likely to happen at any moment without warning. This would usually refer to a situation where injury might occur before the hazard could be removed. In Mr. Brailsford's case, the trolleys that had defective brakes had to be moved inflight, which meant that trolleys were "in use" and therefore created an imminent danger.

In seeking remedies, counsel requested that the Board overturn the safety officer's finding and find that

Stephen Brailsford was in imminent danger at the time of his refusal and to issue a directive in accordance with section 130(1) in order to ensure that defective trolleys will not be allowed onboard aircraft.

VI

Safety officer Carter reiterated the steps in the refusal process. If an employee encountering or anticipating unsafe working conditions exercises his right to refuse, the employer is obligated to investigate the matter in the presence of the employee and member of the OH&S Committee. Had that happened on September 6, 1990, then a safety officer from either Transport Canada or Labour Canada would have been summoned to investigate and render a decision as to whether the condition was safe or unsafe. Although Mr. Carter stated that he could appreciate why Mr. Brailsford did what he did, partly out of fear of reprisal from his employer, this situation cannot be part of the issue before the Board at this time. The Code does offer protection to employees in such situations.

Mr. Brailsford himself stated that he was satisfied after talking to the flight engineer that the carts would not fly off the mushrooms. He did not continue to exercise his right to refuse.

Braking devices on the carts must function. Carts when locked on a mushroom are safe in that they will remain there. Carts stored on a mushroom, not being used, are not "in use". Locking carts in some locations may block access to required equipment. According to safety officer Carter, observations during the investigation

indicated also that some locations did not block access to required equipment.

The safety officer's decision was based on Transport Canada's definition of carts considered to be "in use" and on the assumption that there were sufficient non-critical locations on the aircraft to store the unserviceable carts and therefore did not constitute "a danger" within the meaning of the Code.

Regarding the request of a direction being issued to the company, Transport Canada views Mr. Gibson's September 24, 1990 memo as an assurance of voluntary compliance. If and when this company under whatever name returns to operations, safety officers from Transport Canada will make a point of monitoring the compliance promised in Mr. Gibson's memo. If Transport Canada finds non-compliance, then Transport Canada will issue a direction.

VII

DECISION

This inquiry is not an investigation into the allegation that Mr. Brailsford felt coerced and intimidated into not continuing to exercise his right to refuse unsafe work. This is a referral of a safety officer's decision under section 129(5) of the Code. The Board must therefore analyze the safety issue which was the subject of the work refusal. The Board must direct itself to the nature and to the sufficiency of the consideration which the safety officer had given to the safety issue and to the refusal.

For the aviation industry, safety officers from

Transport Canada are considered to be safety officers as contemplated by the Code pursuant to an agreement between Transport Canada and Labour Canada.

The relevant provisions of sections 128 and 129 of the Code provide as follows:

"128. (1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place.

...

(6) Where an employee refuses to use or operate a machine or thing or to work in a place pursuant to subsection (1), or is prevented from acting in accordance with that subsection pursuant to subsection (4), the employee shall forthwith report the circumstances of the matter to his employer and to

(a) a member of the safety and health committee, if any, established for the work place affected; or

(b) the safety and health representative, if any, appointed for the work place affected.

(7) An employer shall forthwith on receipt of a report under subsection (6) investigate the report in the presence of the employee who made the report and in the presence of

(a) at least one member of the safety and health committee, if any, to which the report was made under subsection (6) who does not exercise managerial functions;

(b) the safety and health representative, if any; or

(c) where no safety and health committee or safety and health

representative has been established or appointed for the work place affected, at least one person selected by the employee.

(8) Where an employer disputes a report made to the employer by an employee pursuant to subsection (6) or takes steps to make the machine or thing or the place in respect of which the report was made safe, and the employee has reasonable cause to believe that

(a) the use or operation of the machine or thing continues to constitute a danger to the employee or to another employee, or

(b) a condition continues to exist in the place that constitutes a danger to the employee,

the employee may continue to refuse to use or operate the machine or thing or to work in that place.

129.(1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the employer and the employee shall each forthwith notify a safety officer, and the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee or the employee's representative.

(2) A safety officer shall, on completion of an investigation made pursuant to subsection (1), decide whether or not

(a) the use or operation of the machine or thing in respect of which the investigation was made constitutes a danger to any employee, or

(b) a condition exists in the place in respect of which the investigation was made that constitutes a danger to the employee referred to in subsection (1),

and he shall forthwith notify the employer and the employee of his decision.

...

(4) Where a safety officer decides that the use or operation of a machine or thing constitutes a danger to an employee or that a

condition exists in a place that constitutes a danger to an employee, the officer shall give such direction under subsection 145(2) as the officer considers appropriate, and an employee may continue to refuse to use or operate the machine or thing or to work in that place until the direction is complied with or until it is varied or rescinded under this Part."

An employee who invokes the right to refuse under section 128(1) is bound under section 128(6) to report forthwith the circumstances of the matter; then section 128(7) obligates the employer to investigate the matter. Section 128(8) allows an employee, who continues to believe that danger exists, to continue to refuse to use or operate the machine or thing or to work in that place.

Where an employee continues to refuse, section 129(1) obligates the employee and the employer to notify a safety officer who will investigate the matter in the presence of the employer and the employee or the employee's representative. The employer does not make the final decision about the existence or non-existence of danger. Only a safety officer within the meaning of the Code is empowered to decide whether or not there is danger upon completion of an investigation under section 129(2).

Mr. Brailsford spoke of the possibility and potential for danger; however, there is no evidence, either from Mr. Brailsford or the safety officer's report, that on the day in question, there were in fact such dangers.

Mr. Brailsford did complain to his employer. After Mr. Brailsford discussed the matter with the flight deck captain and the flight engineer, he was satisfied with

their explanation. He no longer continued to exercise his right to refuse under section 128(8) or 129(1).

Sections 133 (1) (2) and (3) of the Code govern the filing of complaints with the Board alleging illegal employer action against an employee who has invoked the right to refuse provisions of sections 128 and 129. Mr. Brailsford stated that he felt coerced and intimidated by Mr. Gibson's August 29, 1990 memo addressed to ISM's. His recourse is found in section 133; however, Mr. Brailsford did not pursue this recourse.

Discussions about "problem trolleys" have been ongoing for some time with the company and the flight attendants and the union through the OH&S Committee and through previous work refusals, but have not yet managed to reach a solution. See Amber Hockin-Jefferson, supra.

The right to refuse is an emergency measure to deal with dangerous situations that crop up unexpectedly and with those that require immediate attention and not as the primary vehicle for attaining the objectives of Part II of the Code or for settling long-standing disputes or differences. The safety provisions in the Code are intended to ensure that employers provide safe work places in terms of equipment and environment. The right to refuse is designed to be used in situations where employees are faced with immediate danger when injury is likely to occur right there and then if the danger is not removed. It is not meant to be used to bring ongoing disputes to a head and, where refusals coincide with other labour relations disputes, particular attention should be paid to the circumstances of the refusal. See William Gallivan (1981), 45 di 180; and

[1982] 1 Can LRBR 241 (CLRB no. 332); Ernest L. Labarge (1981), 47 di 18; and 82 CLLC 16,151 (CLRB no. 357); and Amber Hockin-Jefferson, supra.

Section 128 of the Code, which gives employees the right to refuse, restricts the object of the concern for danger to the employee or to another employee. (See Amber Hockin-Jefferson, supra.)

In Monica McHugh et al. (1989), 78 di 1 (CLRB no. 743), the Board stated:

"I will deal with non-functioning equipment ... under Part II of the Code, any concern for the safety of the passengers which the complainants may have had, is quite irrelevant. ... section 128 of the Code, which gives employees the right to refuse, restricts the object of the concern for danger to the employee or to another employee."

(page 7)

Danger is defined in section 122(1) of the Code as follows:

"'danger' means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected."

In David Pratt supra, the Board stated that:

"... The exercise at this stage of the process is not to determine whether the employee is right or wrong ... It is to investigate the problem which has been identified by the employee and to assess whether the risk of injury or illness is so acute that corrective measures have to be taken before the employee can safely operate the machine or thing

or work in the place. If the answer is affirmative, then obviously corrective steps have to be taken, even if the solution is only temporary. If the answer is negative, this is where enlightened discussion can relieve the employee's anxiety and production can resume... ."

(pages 225-226; and 318)

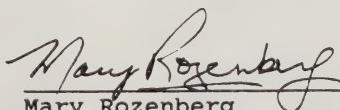
Before closing, we reiterate what the Board said in David Pratt, supra:

"... because a safety officer or the Board finds that there is no immediate danger to an employee and that the operation can resume, it does not mean that danger in the strict sense of the word does not exist at all. There may still be reason enough for the circumstances to be investigated further through the safety and health committees or representatives with a view to reducing the risk of injury or illness ... into the long-term effects of the hazard or condition that caused the employee's anxiety in the first place."

(pages 226; and 318)

Finally, we reiterate what safety officer Carter told this Board. If and when this company under whatever name returns to operations, safety officers from Transport Canada will make a point of monitoring the compliance promised in Mr. Gibson's memo and, if Transport Canada finds non-compliance, it will then issue a direction.

Considering all of the facts in this case, the no-danger decision issued by the safety officer is confirmed.



Mary Rozenberg
Member of the Board

ISSUED at Ottawa this 18th day of March 1992.

CLRB/CCRT - 921

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Summary

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, SHIP AND DOCK FOREMEN, LOCAL 514, COMPLAINANT, AND PACIFIC COAST TERMINALS CO. LTD. AND VANCOUVER WHARVES LIMITED, RESPONDENTS.

Board Files: 745-4178
745-4179

Decision No.: 922

These reasons deal with two complaints under section 50(b) of the Canada Labour Code (Part I - Industrial Relations) in which the complainant union alleged that unlawful alterations had been made to existing work practices and to the method of paying foremen on the Vancouver waterfront after notice to bargain had been served:

"50. Where notice to bargain collectively has been given under this Part, ...

(b) the employer shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, until the requirements of paragraphs 89(1)(a) to (d) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or such a right or privilege."

The complaints were allowed. In its reasons, the Board briefly reviews the interpretation and policies relating to the purposes and scope of the "freeze provisions" under this section of the Code. In particular, the Board re-affirms that the provisions of section 50(b) extend far beyond the

Résumé de Décision

SYNDICAT INTERNATIONAL DES DÉBARDEURS ET MAGASINIERS, CONTREMAÎTRES DE NAVIRES ET DE QUAIS, SECTION LOCAL 514, PLAINTANT, AINSI QUE PACIFIC COAST TERMINALS CO. LTD. ET VANCOUVER WHARVES LIMITED, INTIMÉES.

Dossiers du Conseil: 745-4178
745-4179

Décision n° 922

Les présents motifs portent sur deux plaintes fondées sur l'alinéa 50(b) du Code canadien du travail (Partie I - Relations du travail), dans lesquelles le plaignant allègue que les employeurs ont modifié illégalement des pratiques de travail et le mode de paiement des contremaîtres de quais à Vancouver après qu'un avis de négociation eut été donné.

"50. Une fois l'avis de négociation collective donné aux termes de la présente partie, les règles suivantes s'appliquent: ...

b) tant que les conditions des alinéas 89(1)a) à d) n'ont pas été remplies, l'employeur ne peut modifier ni les taux des salaires ni les autres conditions d'emploi, ni les droits ou avantages des employés de l'unité de négociation ou de l'agent négociateur, sans le consentement de ce dernier."

Le Conseil a accueilli les plaintes. Dans ses motifs, il a brièvement passé en revue l'interprétation des dispositions sur le gel prévues dans le Code ainsi que les politiques relatives au but et à la portée de ces dispositions. En particulier, le Conseil réaffirme que les dispositions

specific language of collective agreements and affects the employment relationship in its entirety.

As a remedy, the Board ordered both employers to reinstate all of the work practices and methods of payment that had been altered during the freeze period and also ordered that employees in the bargaining unit who had been adversely affected by the unlawful changes be compensated in the amount they would have earned.

de l'alinéa 50b) vont au-delà du libellé de conventions collectives et visent l'ensemble de la relation employeur-employés.

En guise de redressement, le Conseil ordonne aux deux employeurs de rétablir les pratiques de travail et les modes de paiement qui ont été modifiés pendant la période de gel. En outre, il leur ordonne de verser aux employés membres de l'unité de négociation qui ont été lésés par les modifications illégales un dédommagement équivalant à la somme qu'ils auraient gagnée.

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Reasons for decision

International Longshoremen's
and Warehousemen's Union, Ship
and Dock Foremen, Local 514,

complainant,

Pacific Coast Terminals Co.
Ltd.

and

Vancouver Wharves Limited,
respondents.

Board Files: 745-4178
745-4179

The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Messrs. Michael Eayrs and François Bastien, Members.

Appearances:

Mr. Bruce Laughton, for the applicant; and
Mr. Eric J. Harris, for the respondents.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

These reasons deal with two complaints under section 50(b) of the Canada Labour Code (Part I - Industrial Relations) in which the International Longshoremen's and Warehousemen's Union, Local 514, (the union or Local 514) alleged that Pacific Coast Terminals Co. Ltd. (Pacific Coast), and Vancouver Wharves Limited (Vancouver Wharves) had changed certain conditions of

employment and/or rights and privileges of employees and/or of the union after notice to commence collective bargaining had been served. Section 50(b) provides:

"50. Where notice to bargain collectively has been given under this Part, ...

(b) the employer shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, until the requirements of paragraphs 89(1)(a) to (d) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or such a right or privilege."

The union denied having given its consent for any change or alteration and asked the Board to restore the status quo and to compensate its members for any loss of wages or benefits suffered as a result of the illegal conduct by Pacific Coast and Vancouver Wharves.

II

To put these complaints in their proper perspective, it is necessary to go back to SGS Supervision Services Inc., unreported Board Decision no. 914 issued on January 31, 1992 where the Board dealt with an application for a declaration of an unlawful strike affecting a different local union in the longshoring industry on the Vancouver waterfront. Noting that there had been a series of incidents of unlawful job action during the preceding months involving the longshoring industry on the west coast where the underlying cause appeared to have been unilateral actions by employers affecting employment practices, the Board said the following:

"The situation at the Port of Vancouver is still a long way from reaching the stage where the Board has to abandon its practice of seeking labour relations solutions to labour relations problems in order to uphold the letter of the law. The Board is confident that it will not be forced into taking a hard-line and that management and labour in the longshoring industry can put their own house in order. We say both management and labour because, as we have witnessed here, job action is generally a reaction to some form of initiative from management. These initiatives more often than not tend to alter existing practices and unfortunately some of them are implemented at extremely sensitive periods of time such as, for example, while negotiations are taking place for the renewal of a collective agreement when the scheme of the Code calls for a freeze of the status quo in order to maintain the balance of power at the bargaining table (section 50(b)). Invariably, the response from trade unions and their members is to take instant reprisals by way of job action rather than go through the sometimes lengthy process of seeking a remedy from this Board which, of course, requires Ministerial Consent. These types of situations can be avoided if both sides are aware of and accept their responsibilities under the Code. As we have already said, we are confident that this will occur on the waterfront. In the meantime, the Board's stated policies relating to unlawful strikes will remain in effect."

(pages 9-10)

The Board's expectations for industrial peace at the Port of Vancouver were short-lived; hardly two weeks had gone by when on February 10, 1992, Vancouver Wharves filed an application with the Board seeking a declaration of an unlawful strike under section 91 of the Code against Local 514 (Board file 725-308). A few days later, on February 14, 1992, Pacific Coast filed a "me too" application seeking a similar declaration against the union (Board file 725-309). Both applications alleged that Local 514 and its members had been engaged in concerted unlawful job actions that had resulted in production being reduced by about 40%. The union responded by alleging that both employers had

unilaterally changed certain conditions of employment during the freeze period provided for in section 50(b) of the Code and the union informed the Board that it had applied to the Minister of Labour for the necessary consent under section 97(3) of the Code to bring complaints to the Board:

"97. (3) Except with the consent in writing of the Minister, no complaint shall be made to the Board under subsection (1) in respect of an alleged failure to comply with section 50 or paragraph 94(3)(g) or 95(a) or (b)."

Local 514 asked the Board not to deal with the unlawful strike applications until such consent had been granted so that the complete picture would be before it at the same time.

The unlawful strike applications were scheduled to be heard at Vancouver on February 24, 1992 by which time the union had not yet received Ministerial Consent for its section 50(b) complaints. However, the problem of splitting the cases was resolved when, at the urging of the Board, the parties arrived at a settlement as to how the matters would be dealt with. The first stage was that the union would agree, without prejudice, to the Board issuing a cease and desist order immediately which would bring all unlawful strike activities at the port to a halt. The quid pro quo for this consent order was that the Board would hear the union's section 50(b) complaints during the following week. In this regard, Pacific Coast and Vancouver Wharves agreed to notify the Minister that they were not opposing the issuance of consent for the complaints to be brought. Counsel for the parties also agreed to waive all time limits and to have all the necessary paperwork in place to enable the

Board to deal with the complaints in this expedited fashion. In accordance with the foregoing terms of settlement, the Board issued the agreed to cease and desist order late in the day on February 24, 1992 and, the section 50(b) complaints were scheduled to be heard on March 5 and 6, 1992 at Vancouver. Ministerial consent dated February 28, 1992, was filed with the Board prior to the matters being heard.

III

The interpretation to be given to section 50(b) of the Code vis-à-vis its purpose and scope has been well documented, therefore, we do not intend to spend much time repeating these well-established principles. The purpose and scope of these "freeze provisions" as they are commonly referred to were set out in Air Canada (1977), 24 di 203 (CLRB no. 113):

"..This section prohibits an employer from altering 'the rates of pay, any term or condition of employment or any right or privilege of the employees in the bargaining unit' or 'any right or privilege of the bargaining agent' until the time of a lawful work stoppage, unless 'the bargaining agent consents to the alteration of such a term or condition or such a right or privilege'. The prohibition is imposed on the employer, because Parliament recognizes that in the normal course it is the employer that is in the position to influence the proceedings at the bargaining table by making decisions affecting its operation without prior consultation with the union. By making such decisions and acting unilaterally, the employer can undermine the authority of the employees' bargaining agent, and also poison the environment within which collective bargaining is being conducted and thereby catalyst avoidable legal or illegal industrial conflict. Such unilateral action is contrary to the cooperative relationship envisioned by and sought to be promoted in the Canada Labour Code, Part V (now Part I)."

The scope of the prohibition in section 148(b) (now section 50(b)) is deliberately more expansive than the scope of past collective agreements. Current or prospective negotiations between a trade union and employer are not restricted to the subjects addressed in previous collective agreements. In circumstances where the negotiation is for a first collective agreement there is no such point of reference. A bargaining agent seeking to negotiate a first collective agreement or a renewal of an existing collective agreement is not restricted in the matters that it may seek to include in a collective agreement...

... The trade union may seek to negotiate with respect to any matter that is a term and condition of employment, expressed in either individual contracts of employment or a previous collective agreement, and any other matter, characterized by Parliament as 'any right or privilege of the employees in the bargaining unit'. It may also seek to negotiate with respect to 'any right or privilege of the bargaining agent' whether acquired in a previous collective agreement or otherwise enjoyed by the trade union." ...

(page 214)

The primary purpose of section 50(b) is clearly collective-bargaining oriented. The freezing of all of the terms and conditions of employment as well as all rights and privileges of the employees in the bargaining unit and the rights and privileges of the bargaining agent when notice to bargain is served sets the demarcation line for the commencement of negotiations. In other words, the status quo becomes the focal point for collective bargaining.

In a manner of speaking, what Parliament has created is a form of statutory estoppel which is designed to prevent employers from altering the employment relationship to gain an advantage at the bargaining table. If employers could freely manipulate the pattern

of the employment relationship each time a collective agreement comes up for renewal, trade unions could find themselves facing ever-receding horizons at the bargaining table and they could be forced into a position where they would have to negotiate just to regain the ground they held prior to the serving of notice to bargain.

Collective bargaining is much more than the periodic visible negotiations where representatives of employers and trade unions gather around a table to hammer out a collective agreement. It is a dynamic phenomenon of which ongoing sound labour-management relations are an essential element. While collective agreements obviously form the substantial basis for the employment relationship, there is flexibility available to the parties in its day-to-day application. As circumstances change or, as new or unforeseen situations crop up, employers and trade unions are free to mutually agree to adjust or to expand upon the terms and conditions dictated by the collective agreement. In fact, parties to a collective agreement can re-negotiate any provision of a collective agreement during the life of the agreement other than its term (section 67(2) of the Code).

In practice, what most parties do in these situations is to enter into letters of understanding which become addendums to the collective agreement. There are, however, many mid-term adjustments that never are committed to writing; they simply remain as mutual understandings or hand-shake agreements which, we might mention, causes fits at times on this Board,

particularly when the Board is faced with complaints from union members under the duty of fair representation provisions of the Code. The reality of the free collective bargaining world though is that all of these formal or informal agreements between the parties are quite legitimate and they go to make up the total employment package. Hence the broad scope of section 50(b) which extends beyond the pure language of the collective agreement to include the employment relationship in its entirety. The Board made this clear in Canadian Pacific Limited (1986), 64 di 36; and 86 CLLC 16,020 (CLRB 554):

"The Ontario Board, which has applied this rule consistently, has stated that this is also true for the employer-union relationship (quoted in Québec Aviation Limitée, supra):

'The purpose of [the section] is to maintain the prior pattern of the employment relationship, in its entirety, while the parties are negotiating... The status quo includes not only the existing terms and conditions of employment but ... also freezes the 'rights and privileges' of the employer. The section requires both parties to maintain the existing pattern of their relationship; that is, to conduct their business as before.
...'

(AES Data Limited, [1979] OLRB Rep. May 368, pages 370-371; emphasis added)

Once the freeze period starts, the way the parties related to each other becomes crystallized; they must deal with each other in the same way they did up to that point, 'as before'. Not only is the existing policy the rule, but so is the existing way of applying it. Both become the rule by which management has to operate. Management rights, however broadly defined, or undefined, become, for a while at least, restricted to the practical application they had at the outset of the freeze period, the employer must behave as before."

(pages 53-54; and 14,170; emphasis added)

The concept of business as before became the policy of the Board back in 1982. At that time, there were differing views amongst those on the Board as to whether the proper interpretation to be given to section 50(b) (then section 148(b)) should be the accepted North American approach of business as before or, whether the Board should adopt the concept that had become known as the "static freeze". Without going into detail, this latter freeze which had been advocated in at least two decisions of the Board, meant that a certified bargaining agent became in effect, an equal partner of the employer in all matters relating to rights, privileges and terms and conditions of employment. Once notice to bargain was served, each party had to negotiate to establish their respective rights as well as the terms and conditions of employment for the employees in the bargaining unit (see Royal Bank of Canada (1978), 27 di 701; [1978] 2 Can LRBR 159; and 78 CLLC 16,132 (CLRB no. 125); and Bank of British Columbia (1980), 40 di 57; [1980] 2 Can LRBR 441; and 80 CLLC 16,032 (CLRB no. 239) and Bank of British Columbia, Abbotsford, B.C. (1980), 41 di 188; [1980] 3 Can LRBR 576; and 81 CLLC 16,068 (CLRB no. 266)). This notion of static freeze which was primarily aimed at new collective bargaining regimes was rejected by a majority of the full Board sitting in plenary session in Bank of Nova Scotia (1982), 42 di 398; [1982] 2 Can LRBR 21; and 82 CLLC 16,158 (CLRB no. 367). The business as before approach became the stated policy of this Board and section 50(b) has been applied consistently in that manner ever since.

IV

Pacific Coast and Vancouver Wharves are but two of nineteen companies that are members of the Waterfront Foremen Employers Association (W.F.E.A.) which negotiates on behalf of its member companies with Local 514. The latest collective agreement between the W.F.E.A. and Local 514 was in effect from January 1, 1989 to December 31, 1991. Notice to commence collective bargaining for the renewal of this collective agreement was served by the union on September 28, 1991. For the purposes of these complaints, it is not in dispute that the freeze provisions of section 50(b) of the Code are in operation.

The relationship between the W.F.E.A. and its members with Local 514 is a classic example of where there are numerous industry practices in effect that provide benefits over and above the specific terms of the collective agreement. According to the testimony of the union's President, Mr. Doug Sigurdson, there are literally hundreds of understandings or hand-shake agreements governing the work practices on the waterfront. These have apparently developed over the years to accommodate the immediate needs of the member companies in an industry where operations peak depending on the arrival and departure of ocean-going vessels. The history of the relationship vis-à-vis the recognition of the union by different member companies to represent certain classifications of supervisory employees has also had a bearing on how some foremen have been paid. It is some of these extra collective agreement practices that Pacific Coast and Vancouver

Wharves and other members of the W.F.E.A. have been endeavouring to change. It has been common knowledge on the waterfront since at least the spring of 1991 that certain companies intended to cut back on the number of foremen on given shifts and that there would be a reduction in the number of overtime hours paid to foremen.

Another W.F.E.A. member, Squamish Terminals Ltd. (Squamish) attempted as far back as October, 1990 to alter its practices of paying its Head Foremen for an extra hour per day at overtime rates for which the foremen did not work. Squamish also eliminated the title of Head Foreman. These changes became the subject of a grievance that was eventually heard by the industry arbitrator, Mr. Douglas H. Cameron. In his award dated February 26, 1991, the arbitrator ruled that Squamish was estopped from implementing such changes until proper notice was served on the union and the appropriate changes were negotiated. (see Re Waterfront Foremen Employers Association and International Longshoremen's Union, Ship and Dock Foremen, Local 514, February 26, 1991 (D.H.Cameron (B.C.))). This award was challenged in the Supreme Court of British Columbia by the W.F.E.A. The outcome of these proceedings was that the Court, per Mr. Chief Justice Esson, found that there was no basis to interfere with the award. (see Waterfront Foremen Employers Association v. International Longshoremen's Union, no. A912489, September 9, 1991 (Chief Justice Esson, B.C.S.C.)).

The question that was not answered by the arbitrator or by the Court was when does the estoppel end? Both were very careful not to address this issue as it was not

before them. At a later arbitration, however, before Mr. Stephen Kelleher, this issue as it affected Squamish was addressed head on. This second arbitration proceeding came about in an expedited fashion in January 1992 at the instigation of the Conciliation Officer who had been appointed under the Code to assist the parties to resolve their differences. At that time collective bargaining was stalled over these issues and both Pacific Coast and Vancouver Wharves had served notice on the union that certain changes to their work practices would be implemented at the end of January. In this award, which was handed down on January 28, 1992 Mr. Kelleher ruled that Squamish was estopped from making unilateral changes until the expiry of the section 50(b) freeze period:

"I have concluded that the estoppel in the present case should continue until the end of the statutory freeze created by Section 50(b) of the Canada Labour Code. In the first place, it is clear that cases like the present one should be decided on its own facts. What is significant in the present case is the provisions of the Canada Labour Code. In other words, this case arises in a different legal context. Virtually all of the decisions referred to me were decided under Ontario and British Columbia legislation.

Second, the date the freeze ends, in collective bargaining between these parties, is a date which has some bargaining and legal significance. For purposes of this dispute, the expiry date, December 31, is really no different from, say, November 30 or December 15. Bargaining began in early November. From that time on, bargaining was no longer 'in abeyance' (see Hickling, supra, at 5.1.12). From early November on, the Union had the 'opportunity to negotiate'. But this opportunity can be rather hollow: if the Employer is not agreeable to a proposal, the Union does not at that point have economic tools at its disposal. The Employer's bargaining power can be rather limited as well: it cannot lock out or unilaterally implement changes in terms and conditions of employment. Those limitations were on the parties throughout November and December and to the present.

The Union's legal position from the beginning of bargaining to the present is unchanged: they have the ability to bargain but do not yet have the legal right to take economic action. Their position was the same after December 31 as it was before. This only changes when the requirements of Section 50(b) of the Code have been met."

(Re Squamish Terminals Ltd., represented by the Waterfront Employers Association and International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local no. 514, January 15, 1992 (S. Kelleher, B.C.) at pages 18-19)

According to the union, this arbitration was expected to answer the overall question of when unilateral changes could be made for the purposes of the negotiations with the W.F.E.A. Mr. Doug Sigurdson told the Board that he thought that the Kelleher decision would be binding on all members of the W.F.E.A. However, this did not turn out to be the case. In a communication to the member companies, the President of the W.F.E.A., Mr. Siedo Tzogoeff, took the somewhat remarkable position that the Kelleher decision did not mean that non-contract work practices were caught by section 50(b) of the Code and that there is no requirement for employers to bargain them out:

"Yesterday, arbitrator Steven Kelleher issued his decision in the work practices 'estoppel' case involving Squamish Terminals Ltd. and the ILWU, Local No. 514. The members will remember that this is the case that first came in front of Doug Cameron in February 1991. The Cameron Award shocked the industry by appearing to put work practices on the same footing as the terms of the collective agreement; namely, the members would have to bargain these practices out of the contract. The Kelleher decision rejects the argument that employers cannot unilaterally terminate non-contract work practices. Although Kelleher did not accept our argument that the practices should end at the latest at the expiry of the Collective Agreement, he also rejected the Union's position that the

practices must continue until the new Collective Agreement was signed. The decision confirms that the Union's agreement or consent is not required for the practices to end. Simply put, the practices come to an end on reasonable notice. In the Squamish case, Kelleher decided that reasonable notice meant that the practices would come to an end at the end of the statutory 'freeze' period in Section 50 of the Canada Labour Code.

...

Work practices which are not part of the Collective Agreement do not rank as Collective Agreement terms. They can be brought to a complete end by giving proper notice to the Union.

This does not require the Union's agreement or consent. The employer does not have to bargain them out. Nor do the practices continue until the Union has signed a new Collective Agreement. The only thing that is required of the employer is that he give notice and that the notice is reasonable.

...

In the Squamish situation, Kelleher found reasonable notice to be until the end of the 'freeze' period in Section 50 of the Collective Agreement. This does not mean that the practices are caught by the 'freeze' period. It means that the Arbitrator decided that this was the amount of notice which the Union must receive in order to give it an effective opportunity to bargain about the matter.

...

In short, the Union has now had confirmed what we have been insisting since the beginning of this episode - that the employers are entitled to bring work practices to an end by giving notice. Having called for the Kelleher case to be heard in the midst of bargaining, they will have to live with that ruling. For our part, barring any appeals, Squamish will have to live with the fact that the practices will continue until the end of the freeze period before they lapse. I will be calling a meeting of the Board so that we can consider our strategy regarding the Squamish practices, and other practices on which notice has been given. Since estoppel cases depend on their own facts, Vancouver Wharves and PCT (Pacific Coast) may not be bound to wait until the end of the freeze period. We will be considering this."

(Memorandum from W.F.E.A. to Members dated January 29, 1992)

Against that background, Pacific Coast and Vancouver Wharves implemented a number of changes effective January 31, 1992. For our purposes there is no need to go into the specific details of each alteration as they are really not in dispute and they are clearly set out in the documents placed before the Board (see tabs 3 and 4 of Exhibit No. 2). Suffice it to say that the number of foremen were reduced in certain situations and other restrictions were put in place regarding the number of hours to be worked and the hours that were to be paid for. These restrictions related primarily to starting and finishing times and also altered existing practices where foremen either worked through their lunch breaks or were paid for lunch breaks even if they took one. These changes reduced the number of foremen required on shift at given times as well as the number of hours worked by certain foremen. They also reduced the foremen's income. In some instances the reduction in pay resulted from the cessation of payment at overtime rates for hours that were not actually worked.

v

At the hearing on March 5 and 6, 1992, both Pacific Coast and Vancouver Wharves took the position that the Board should exercise its discretion under section 98(3) of the Code and defer these matters to an arbitrator:

"98.(3) The Board may refuse to hold a public hearing on a complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board."

Apparently, Local 514 has already grieved the changes that Pacific Coast and Vancouver Wharves have implemented. These grievances are now at the stage where they are to be referred to an arbitrator, however, both employers are refusing to have the matters dealt with by the industry arbitrator and have applied to the Minister of Labour under section 57(4) of the Code for an arbitrator to be appointed. Pacific Coast and Vancouver Wharves now argue that the Board ought not to intervene in what they describe as purely a dispute over local industry practices which are historically dealt with through the dispute resolution mechanisms in the collective agreement. Local 514, on the other hand, points out the futility of having further arbitrations on the very same issue that the union says it has been forced to take before arbitrators twice already. The union argued that this dispute is a matter of public interest that ought to be dealt with by the Board in light of the fact that these issues are stalling negotiations which can have severe ramifications for the shipping industry at the Port of Vancouver. The union urged the Board not to defer to the arbitration process.

It is true that the Board has recently indicated its reluctance to interfere in matters that arise from the interpretation of collective agreements and has said that it will not allow itself to become an alternative forum to the grievance-arbitration process which is mandatory under section 57 of the Code. (see Canada Post Corporation (1989), 76 di 212 (CLRB no. 729)). However, in the circumstances before us now, we have no hesitation at all in denying the request to defer to

arbitration. In our view, counsel for the union is correct in his assessment that the situation is one that falls within the Board's supervisory role over collective bargaining. As we pointed out earlier, section 50(b) is primarily collective-bargaining oriented and as such it is an adjunct of the duty to bargain in good faith that is contained in section 50(a) over which the Board has exclusive jurisdiction. While the dispute between these parties may well have been one of past practice and reasonable notice within the doctrine of estoppel at the time of the Cameron Arbitration Award, once section 50(b) of the Code was triggered by the serving of notice to commence collective bargaining, it became very much the business of this Board. Furthermore, considering the attitude of the W.F.E.A. following the Kelleher Award, it may well be as counsel for the union put it, that the union could be forced to seek sixteen further arbitral decisions, one for each of the remaining members of the W.F.E.A. before the principles announced in the Kelleher Award are accepted and collective bargaining can get underway. In these circumstances, the Board will not exercise its discretion under section 98(3) of the Code.

Turning to the merit of the complaints, the Board has little or no hesitation in finding that by implementing the changes which they did, Pacific Coast and Vancouver Wharves violated section 50(b) of the Code. There can simply be no argument about whether the practices that were changed fall within the scope of section 50(b). Many of these practices have been in effect since the early 1980's and all of them are clearly part of the "employment relationship in its entirety" to which we

referred earlier. When notice to bargain was served at the end of September 1991, all of these practices became potential subjects for negotiations and as such, they could not and cannot be altered without the consent of the bargaining agent until the provisions of section 89 of the Code have been met and the parties have achieved the right to strike or to lock-out. Even then, changes to the status quo can be subject to the obligation to bargain in good faith under section 50(a) of the Code.

To remedy this situation, pursuant to the remedial powers found in section 99 of the Code:

"99.(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or section 37, 50, 69, 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may

(a) in respect of a failure to comply with subsection 24(4) or paragraph 50(b), by order, require an employer to pay to any employee compensation not exceeding such sum as, in the opinion of the Board, is equivalent to the remuneration that would, but for that failure, have been paid by the employer to the employee;

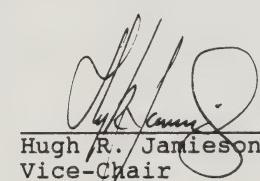
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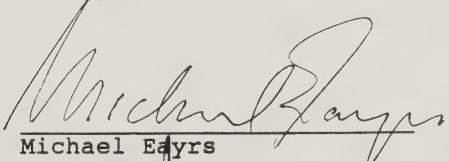
99.(2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives."

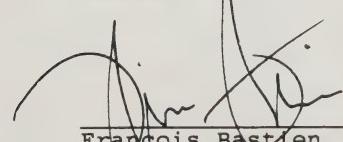
the Board hereby orders Pacific Coast and Vancouver Wharves to immediately reinstate all of the work practices relating to the employment of foremen as well as the methods of paying the foremen as they existed as of the serving of notice to commence collective bargaining. Pacific Coast and Vancouver Wharves are further ordered to compensate all employees in the bargaining unit who were adversely affected by said changes, in the amount that they would have earned but for the unlawful alterations to the terms and conditions of their employment.

The Board will not issue a formal order at this time, however, jurisdiction is retained to do so should the need arise. In the meantime, Mr. Phil Kirkland, the Board's Regional Director at Vancouver, is appointed to assist the parties to implement the foregoing remedies.

The foregoing is a unanimous decision of the Board.


Hugh R. Jamieson
Vice-Chair


Michael Eayrs
Member


Francois Bastien
Member

DATED at Ottawa this 23rd day of March, 1992.

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Summary

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, LOCAL 518,
APPLICANT, AND SGS SUPERVISION
SERVICES INC., EMPLOYER.

Board File: 555-3372

Decision No.: 923

These reasons deal with the jurisdiction of the Canada Labour Relations Board over the operations of SGS Supervision Services Inc. (SGS). This issue arose in an application for certification by the International Longshoremen's and Warehousemen's Union, Local 518, wherein the union sought to represent most of the company's employees in British Columbia.

The Board found that it has no jurisdiction. SGS is in the business of independent inspection, analysis and verification of the quality and quantity of goods and commodities being exchanged in commercial transactions. As such, it is not in itself a federal undertaking. Although many of the work functions of the employees of SGS in British Columbia are done on the waterfront on goods and commodities that are bound for export by marine transportation, the Board found that there was insufficient evidence of operational integration and dependence between SGS and any federal work or undertaking involved in shipping and navigation for there to be a finding of federal jurisdiction under the tests set out by the Supreme Court of Canada in Northern Telecom Limited v. Communications Workers of Canada et al., [1980] 1 S.C.R. 115; (1979), 98 D.L.R. (3d) 1; and 79 CLLC 14,211.

The application for certification was dismissed accordingly.

Résumé de Décision

SYNDICAT INTERNATIONAL DES DÉBARDEURS
ET MAGASINIERS, SECTION LOCALE 518,
REQUÉRANT, ET SERVICES DE SURVEILLANCE
SGS INC., EMPLOYEUR

Dossier du Conseil: 555-3372

Décision n° 923

Les présents motifs traitent de la compétence du Conseil canadien des relations du travail à l'égard des activités de Services de surveillance SGS Inc. (SGS). Cette question a été soulevée dans le contexte d'une demande d'accréditation présentée par le Syndicat international des débardeurs et magasiniers, section locale 518, dans laquelle le syndicat tentait de représenter la plupart des employés de l'entreprise en Colombie-Britannique.

Le Conseil juge qu'il n'a pas la compétence voulue. SGS est une entreprise qui fournit de façon indépendante des services d'inspection, d'analyse et de vérification de la qualité et de la quantité de biens échangés dans le contexte d'opérations commerciales. À ce titre, elle n'est pas une entreprise fédérale. Bien que de nombreuses tâches des employés de SGS en Colombie-Britannique soient effectuées sur les quais et qu'elles soient reliées à des biens destinés à l'exportation par voie maritime, le Conseil juge qu'il n'a pas suffisamment de preuves que l'entreprise SGS fait partie intégrante et dépend d'une entreprise fédérale oeuvrant dans le secteur des transports par eau et de la navigation pour qu'il puisse juger qu'il s'agit d'une entreprise de compétence fédérale en vertu du test établi par la Cour suprême du Canada dans Northern Telecom Limitée c. Les Travailleurs en communication du Canada et autres, [1980] 1 R.C.S. 115; (1979), 98 D.L.R. (3d) 1; et 79 CLLC 14,211.

La demande d'accréditation est donc rejetée.



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Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

International Longshoremen's
and Warehousemen's Union,
Local 518,

applicant,

and

SGS Supervision Services Inc.,
employer.

Board File: 555-3372

The Board was composed of Messrs. Hugh R. Jamieson and J. Philippe Morneault, Vice-Chairs, and Mr. Calvin B. Davis, Member.

Appearances:

Ms. Joan Gordon, for the applicant;
Mr. Bruce R. Grist, for the employer.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

These reasons deal with the issue of the constitutional jurisdiction of the Canada Labour Relations Board to regulate the labour relations of SGS Supervision Services Inc. (SGS or the employer). This question arose in an application for certification which was filed by the International Longshoremen's and Warehousemen's Union, Local 518 (Local 518 or the union) on October 4, 1991 wherein the union sought to be certified as bargaining agent for a unit described as:

"all employees of SGS Supervision Services Inc., including those in its Commercial Testing and Engineering and General Testing Laboratories Divisions, excluding general managers, laboratory managers, dry bulk and liquid bulk managers and the Westshore Terminal manager."

It was not until November 27, 1991 after the parties had exchanged submissions on the appropriateness of the bargaining unit that SGS raised its challenge to the Board's jurisdiction. This late challenge appeared to upset the union, however, it did not come as a surprise to the Board as SGS has consistently raised this issue in previous applications by Local 518. In fact, the Board had scheduled a hearing on this very topic in another application for certification that was filed by Local 518 earlier in 1991 but the union withdrew that application a few days before the hearing (see Board file 555-3279). In these circumstances, even if the employer had not raised the jurisdiction question in this application, the Board itself would have. In any event, the Board heard the parties at Vancouver on February 26, 27 and 28, 1992 at a hearing that was restricted to the constitutional jurisdiction question.

II

SGS is the Canadian affiliate of an international network of companies doing business in 140 countries with headquarters in Geneva, Switzerland. This network includes over 500 offices and 150 specialized laboratories with over 21,000 employees. In Canada the head offices are located at Mississauga, Ontario with

regional offices in British Columbia, Ontario, Quebec, New Brunswick, Nova Scotia and Newfoundland. In British Columbia, SGS has offices at Vancouver, Prince Rupert, and Kitimat.

SGS is in the business of providing independent inspection, testing and analysis, both quantitative and qualitative, of goods and commodities exchanged in commercial transactions. These goods and commodities include various types of industrial products, agricultural goods, fish and fish products, consumer goods, minerals, chemicals, fertilizers, foodstuffs, vegetable and animal oils and fats, petroleum and petrochemical products, cements, pharmaceutical and metallurgical products. SGS is also involved in water and environmental testing and analysis. The end product of this testing and analysis is a certificate which establishes various quantitative or qualitative aspects of a product either during the manufacturing process or at any particular point during a commercial transaction. These certificates can be used for a variety of purposes including securing payment for commodities sold or purchased, for settling insurance claims, or for any other purpose where such independent verification is required.

Commercial Testing and Engineering Co. (CT&E) is a division of SGS with offices in the United States and Canada. It provides inspection, sampling and analytical testing services for coal, coke, oil, oilshale, tar sands, minerals, chemicals, fertilizers, ferro-alloys and environmental properties. The majority of its services are provided to producers and consumers of coal. The work performed by CT&E employees in British

Columbia includes the preparation, testing and analysis of coal samples that are collected by SGS employees at ship loading facilities at North Vancouver and at Roberts Bank, Delta, B.C. Samples are taken either manually or automatically at the waterfront by SGS samplers and are delivered to the CT&E laboratory at the Tilbury Industrial Park, Delta, B.C. where laboratory technicians perform a variety of tests on the coal samples. Besides these laboratory technicians, the CT&E operations also employ a laboratory manager, a laboratory supervisor, a terminal operations manager, a branch manager, an operations co-ordinator and a secretary. The sampling and testing of coal by CT&E is done primarily for Fording Coal Limited and Westar Mining Ltd., two coal mining operations that export coal to the Far East.

General Testing Laboratories (GTL) is also a division of SGS which operates an organic, inorganic and petro-chemical testing laboratory at 1001 West Pender Street, Vancouver. Employees at GTL, who include marine surveyors, sample "preps", laboratory clerks and technicians and assayers, are involved in the inspection and testing of a broad range of commodities including foods, grain, petroleum products, ore concentrates, sulphur and potash. They also conduct metal analysis as well as radioactive isotope measurements of water and effluent. GTL also employs laboratory managers, cleaners, clerks, a secretary and an office manager and a sales manager.

While CT&E and GTL operate from separate locations, there is an overlap in the types of commodities tested and the equipment used. It should also be made clear

that the employees working at CT&E and GTL are all employees of SGS. SGS also employs a number of samplers, inspectors, marine surveyors and other support and managerial staff at its other locations at 409 Granville Street and 877 East Hastings Street, Vancouver. The East Hastings Street operations are mainly involved with the co-ordination and inspection of goods and commodities bound for export. The Granville Street office is the principal office for SGS's British Columbia operations.

At Kitimat, SGS is involved mainly in testing and supervising the loading of methanol and in the transfer of chemical products between two companies involved in the manufacture and export of methanol (Ocelot & Celanese). According to the employer, these transfers involve rail cars and have little to do with shipping. The Kitimat operations of SGS are also involved in testing and monitoring the manufacturing of a new petroleum additive and at times it does work related to the loading and transfer of fibreboard. Some work related to the loading and unloading of railcar barges is also done for Alcan. At Prince Rupert, SGS is mainly involved in the sampling and testing of coal samples from the Bullmoose and Quintette coal mines. Samples are taken before the coal is loaded onto ships at Ridley Terminals. SGS also tests some grain and mineral concentrates at Prince Rupert. At Kitimat, SGS employs a marine surveyor, two cargo surveyors, a branch manager and two other employees who are involved with documentation. At Prince Rupert the employee complement is a laboratory technician, two inspectors and two marine surveyors, one of whom is the local manager.

The marine surveyors employed by SGS are not sought to be included in the bargaining unit affected by this application for certification. These employees are already the subject of a Board certification order that was granted to Local 518 on December 20, 1989 (Board file 555-3018). In those proceedings, SGS did challenge the Board's jurisdiction over its marine survey operations; however, the Board, looking at the very narrow function of the marine surveyors who do spend a substantial amount of their time in the holds of ships, held that these operations were integral to shipping and navigation and took jurisdiction. The Board also found that a separate bargaining unit of marine surveyors was appropriate. Given the instant proceedings, where the Board has the advantage of a much broader overview of SGS's total operations, that decision may now have to be re-examined.

In addition to that collective bargaining relationship with the marine surveyors, SGS and Local 518 are also parties to a collective agreement affecting samplers and inspectors. These inspectors, who are often referred to as cargo inspectors, spend most of their time on the waterfront. Their primary function is to inspect and verify the quality and quantity of bulk commodities prior to and during loading into the holds of vessels. They also conduct inspections on conveyor systems and in the holds to ensure there is no contamination of the materials being shipped. Back in 1974, after applications for certification had been filed with both the Provincial Board and this Board, SGS voluntarily recognized Local 518 as the bargaining agent for the samplers and inspectors. It is the scope of the SGS

bargaining unit in this collective agreement that Local 518 now wishes to extend to include the other employees of SGS in British Columbia by way of the present application for certification.

III

For SGS to be found to be a federal work, undertaking or business it must either be performing a function which in itself falls within a particular head of federal jurisdiction under the Constitution Act, 1867, or be engaged in an operation that is vital, essential or integral to a core federal undertaking (Northern Telecom Limited v. Communications Workers of Canada et al., [1980] 1 S.C.R. 115; (1979), 98 D.L.R. (3d) 1; and 79 CLLC 14,211).

In regard to the first question, Local 518 submitted that SGS is a single indivisible federal undertaking that connects the Province of British Columbia with the other Provinces or that SGS extends beyond the limits of any one Province as contemplated by section 92(10)(a) of the Constitution Act, 1867:

"92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say -

10. Local Works and Undertakings other than such as are of the following Classes: -

- (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;"

Counsel argued that SGS is a federally incorporated company involved in international trade and commerce with corporate links extending throughout Canada and beyond to Europe and the United States. She emphasized the example that the mineral division of SGS participates in a regular and continuous world-wide sample analysis information exchange program. Counsel also pointed out that the national scope of SGS is reflected by the fact that employee benefits are applied on a Canada-wide basis. The Board's attention was also directed to the fact that SGS identifies its own market as national and international trade. In one of its own brochures, SGS says that it is involved in "lubricating the wheels of international trade and commerce".

With the utmost respect, this argument by the union simply cannot be accepted. There is ample authority to support the interpretation that section 92(10)(a) applies only to transportation and communication undertakings. For our purposes, we need only refer to Hake Consortium of B.C. and British Columbia Provincial Council, United Fishermen and Allied Workers' Union (1983), 2 CLRBR (NS) 34 wherein the British Columbia Labour Relations Board recites the following relevant authorities.

"In Hogg, Constitutional Law of Canada (1977) at p. 324, the author advances the following argument:

'A preliminary issue is whether s.92(10)(a) is confined to works and undertakings involved in transportation or communication. Could the federal Parliament assert jurisdiction over an enterprise which spread beyond the limits of any one province but which was not engaged in transportation or communication? An example would be a mutual fund. The answer to this question is almost certainly no, although the point seems never to

have been decided by the courts. The general phrase 'other works or undertakings connecting the province with any other', etc., should be read *ejusdem generis* with the specific examples which precede it, and the specific examples are all modes of transportation or communication. The word 'connecting' in this context should be confined to connections by transportation or communication. Section 92(10)(a) never has been held applicable to any work or undertaking which is not of a transportation or communication character. Moreover, it is well established that the regulation of business enterprises which operate in more than one province, such as insurance companies, is for the most part within provincial authority under property and civil rights in the province, and it has never been suggested that the federal Parliament could assume jurisdiction under s. 92(10)(a). It is safe to conclude, therefore, that s. 92(10)(a) confers a power which is confined to works and undertakings involved in transportation or communication.'

The seed for this argument was suggested by Lord Reid in C.P.R. v. A.-G. B.C., [1950] 1 D.L.R. 721 at 730:

'Head (10)(a) begins by specifying four classes 'Lines of Steam or other Ships, Railways, Canals, Telegraphs', it then adds another class 'and other Works and Undertakings', and then concludes with qualifying words, 'connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province'. Their Lordships have no doubt that these qualifying words apply not only to the words which immediately precede them - 'other works and undertakings' - but also to each of the four classes specified at the beginning of the paragraph. ... The context shows that each of the four specified classes intended to be a class of 'works and undertakings'. Head (10) begins by referring to local works and undertakings and the phrase which follows the four specified classes is 'other works and undertakings'. The latter part of the paragraph makes it clear that the object of the paragraph is to deal with means of interprovincial communication. ...'"

SGS is clearly not in the business of communications or of transportation, therefore, it cannot, in itself, be found to be a federal undertaking within the meaning of section 92(10)(a) on the grounds that it connects or extends beyond the limits of the Province of British Columbia.

As for the contention that SGS is involved in international trade and commerce, we hardly think that this is a relevant consideration here. Even if it can be said that SGS is marginally involved in trade and commerce, which is a matter coming within the legislative authority of Parliament under section 91(2) of the Constitution Act, 1867, this is not grounds to support a finding of federal jurisdiction under section 92(10)(a). (See City of Montreal v. Montreal Street Railway Co., [1912] A.C. 333).

IV

Turning to the question of whether the operations of SGS is vital, essential or integral to a federal undertaking, one must follow the steps set out in Northern Telecom, supra:

- "'(1) *Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.*
- (2) *By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.*
- (3) *Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of*

employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.

- (4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.
- (5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.
- (6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of 'a going concern', without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.'

A recent decision of the British Columbia Labour Relations Board, Re Arrow Transfer Co. Ltd., [1974] 1 Can LRBR 29, provides a useful statement of the method adopted by the Courts in determining constitutional jurisdiction in labour matters. First, one must begin with the operation which is at the core of the federal undertaking. Then the Courts look at the particular subsidiary operation engaged in by the employees in question. The Court must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the necessary relationship being variously characterized as 'vital', 'essential' or 'integral'. As the Chairman of the Board phrased it, at pp. 34-35:

'In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment relationship.'

In the case at bar, the first step is to determine whether a core federal undertaking is present and the extent of that core undertaking. Once that is settled, it is necessary to look at the particular subsidiary operation, i.e., the installation department of Telecom, to look at the 'normal or habitual activities' of that department as 'a going concern', and the practical and functional relationship of those activities to the core federal undertaking.'

(Northern Telecom Limited v. Communications Workers of Canada et al., *supra*; pages 132-133; and 13-14; and 15,263; emphasis added)

The starting point for these tests is to determine whether there is a federal undertaking in the picture at all. If there is, the next step is to assess the relationship between the subsidiary operation and the core federal undertaking in terms of operational integration and dependency. By dependency, we mean of course the dependency of the core federal undertaking upon the services being provided by the subsidiary operation. This concept of dependency was commented upon recently by the Supreme Court of Canada in United Transportation Union et al. v. Central Western Railway Corp., [1990] 3 S.C.R. 1112; 76 D.L.R. (4th) 1; 119 N.R. 1; and 91 CLLC 14,006. Speaking of the Eastern Canada Stevedoring Company Limited, [1955] 3 D.L.R. 721 case, where stevedoring was found to be integral to federal undertakings involved in shipping and navigation and thus federal, Chief Justice Dickson observed:

"Federal jurisdiction there seems to have been based on a finding that the core federal undertaking was dependent to a significant degree on the workers in question."

(pages 1137; 17; 25; and 12,053)

He then went on to say:

"Both the Stevedores' and Letter Carriers' cases indicate that dependence of a core federal work or undertaking upon a group of workers tends to support federal jurisdiction over those workers. In subsequent judgments of this Court, this jurisdictional test has been elaborated upon. Prime among these more recent decisions is Northern Telecom Ltd. v. Communications Workers of Canada and Canada Labour Relations Board, [1980] 1 S.C.R. (Northern Telecom no. 1), where this Court considered the proper interpretation and application of ss. 2 and 4 of the Canada Labour Code."

(pages 1138; 17; 26; and 12,053-12,054)

The Supreme Court also made it clear in Central Western Railway Corp., supra, that the federal undertaking to which the subsidiary operation is connected must necessarily be discrete and identifiable:

"... In my view, however, in order for Central Western to be integrated with a federal work or undertaking, there must exist a discrete and identifiable work or undertaking that is clearly within federal jurisdiction. Such is not the case here."

(pages 1143; 21-22; 33; and 12,056; emphasis added)

In summary, under the Northern Telecom tests it is necessary for there to be a substantial degree of operational integration and dependency between a subsidiary operation and a single identifiable core federal work or undertaking before the presumption of primary provincial competence over labour relations can be ousted.

In the particular circumstances here, there is no discrete federal work or undertaking that can be identified as a core federal undertaking for the purposes of the Northern Telecom tests. However, the union's alternative argument was that the operations of SGS is integral to shipping and navigation. Even if we could use that general heading of federal jurisdiction as the core federal undertaking, it is still unlikely in our opinion that there is sufficient linkage of the sort necessary between marine transportation and SGS to support a finding of federal jurisdiction.

To be fair though, it is not difficult to see why the union relates the sampling, inspection and analysis work done by SGS employees to shipping. The vast majority

of this work is done on commodities such as coal, sulphur, potash, methanol and the likes which are all bound for transportation by sea. Also, as we have said, some of the employees like the samplers and inspectors spend most of their time on the waterfront. They mingle daily with and work shoulder to shoulder with longshoremen and they undoubtedly see themselves as part of the longshoring industry. That probably has a bearing on why they have opted to be represented by Local 518 which is a local of an international longshoring trade union that operates primarily in the federal jurisdiction. This is all part of an understandable mind-set at most ports where it is taken for granted that all work done on the waterfront that has anything to do with shipping falls within the jurisdiction of the longshoremen and that it is therefore necessarily federal. Of course, for the purposes of ascertaining whether SGS is a federal work, undertaking or business within the meaning of the Code, the location of the work may be a relevant consideration but it does not dictate which jurisdiction the operation falls under. (See Re Attorney-General of Nova Scotia and Maritime Engineering Ltd. et al. (1979), 105 D.L.R. (3d) 158 (N.S.S.C., Appeal Div.); and Cargill Grain Company Limited, Gagnon and Boucher Division v. International Longshoremen's Association et al. (1983), 51 N.R. 182 (F.C.A.)). The reality of the matter is, when one looks at the broad picture of the normal and habitual activities of SGS as a going concern, the work done by SGS employees on the waterfront has very little to do with shipping in a constitutional sense.

Other than for an insignificant amount of work related to pre-loading inspections of containers for some

shipping lines, about which the Board heard very little, SGS is not under contract to, nor does it provide any services to ship owners, shipping agents, Port Authorities or any other such undertaking that is directly involved in shipping or navigation. The only connection that SGS has with shipping is that in British Columbia and the same is probably true in other coastal regions, many of its customers happen to be producers, purchasers or sellers of commodities that are bound for export by sea. The transportation aspect of the commercial transactions between the purchaser and seller of these commodities is not, however, dependent upon the determination of the quantity or quality of the goods being shipped. These services, which are performed by SGS as a neutral third party, are related more to the bona fides of the transaction vis-à-vis the quantity and quality of the goods being sold, rather than to how they are being transported.

The fact that many of the work functions of SGS employees are performed just prior to or during the loading of vessels does not necessarily call for a finding that they are working upon or in connection with a federal work, undertaking or business. According to SGS, this verification aspect of the transaction between the supplier and the purchaser of the commodities could be done elsewhere. It could be done at mine sites or other production locations or, even at the delivery point at foreign ports. It could also be done during rail or truck transportation en route to the waterfront. It just so happens that the port of exit is the most practical place for samples for quality tests to be taken and quantities to be ascertained. It is also, as counsel for SGS put it, the place and time where

liability, or the risk for the goods or commodities, passes from the supplier to the purchaser.

Taking all of the foregoing into consideration in light of the requirements of the Northern Telecom tests, it is difficult to see how the operations of SGS can be found to be vital, essential or integral to any core federal undertaking involved in shipping and navigation. SGS employees do not load or unload ships nor do they do anything related to the operation of ships. They are not involved in the storage or warehousing of goods that are in transit on the dockside awaiting shipment by sea and they do nothing related to the operation or maintenance of equipment used for the loading and unloading of vessels. In short, SGS employees do not perform any functions that have been traditionally considered to be longshoring.

It is true that the functions performed by SGS employees are scheduled around the arrival and departure times of ships and that SGS employees perform work related to ship's cargoes, but there is no dependency by the ships on the SGS functions. The confirmation of the quantity or the quality of the goods being shipped is a facet of the commercial transactions separate from the actual transportation of the goods. While these two facets may be connected in that they are sequential aspects of the same commercial transaction, there is insufficient evidence, in our respectful opinion, of operational integration or dependence between what SGS does and a federal undertaking that is involved in the marine transportation of the goods and commodities to their destination overseas, to the degree contemplated by Northern Telecom, supra, that would be necessary to oust

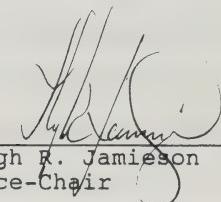
the presumption of primary provincial competence over labour relations and to transform SGS into a federal work, undertaking or business within the meaning of the Code.

For all of the foregoing reasons, it is our finding that the operations of SGS that are affected by this application for certification by Local 518 do not fall within the jurisdiction of this Board. The application is dismissed accordingly.

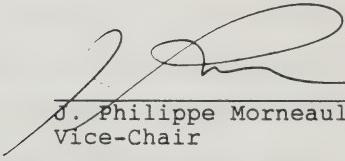
Before closing, we feel that it is appropriate to say a few words about marine surveyors. At the hearing into this matter, the union appeared to be taken aback by some comments to the effect that these proceedings may affect the certification order that was mentioned earlier where, in 1989, Local 518 was granted bargaining rights for a separate bargaining unit of marine surveyors. So that there is no misunderstanding in this regard, we want to make it clear that these reasons do not directly affect marine surveyors employed by SGS. Notwithstanding that we did hear some evidence during these proceedings about the functions of marine surveyors, the fact remains that marine surveyors were not included in the proposed bargaining unit in this application for certification, nor did they receive notice that they may be affected by it. In the interests of natural justice, therefore, the question of what, if anything, happens to the marine surveyors can be left for another day. Should the circumstances today no longer warrant a separate bargaining unit for the marine surveying functions of SGS or, if it is now

clear that these functions are indeed provincial, the parties can come back to the Board if they are unable to mutually decide how to deal with the situation.

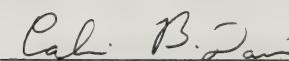
The foregoing is a unanimous decision of the Board.



Hugh R. Jamieson
Vice-Chair



J. Philippe Morneault
Vice-Chair



Calvin B. Davis
Member

DATED at Ottawa this 6th day of April, 1992.

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SUMMARY

WILLIAM QUÉREL, COMPLAINANT,
AND LAROSE-PAQUETTE AUTOBUS
INC., RESPONDENT.

Board File: 745-3425

Decision No.: 924

RÉSUMÉ

WILLIAM QUÉREL, PLAIGNANT, ET
LAROSE-PAQUETTE AUTOBUS INC.,
INTIMÉ.

Dossier du Conseil: 745-3425

N° de Décision: 924

Remedial order pursuant to section 99 of the Canada Labour Code (Part I - Industrial Relations). Determination of amount owed to an employee who was dismissed for union activities (section 94(3) of the Code). Determination of quantum.

The complainant was dismissed in 1989 and reinstated in the summer of 1990, but was never compensated.

Compensation must correspond fully to the definition of lost remuneration.

The Board reviewed the way of determining the amount of the compensation referred to in section 99(1)(c)(ii) of the Code. It examined the issues of unemployment insurance, mitigation, wages earned elsewhere and interests.

The Board found that in the instant case the payment of pre-award interest on lost remuneration was justified in order to ensure that compensation was equivalent to the loss incurred.

Interest was calculated in accordance with the "rough and ready" method outlined in Samuel John Snively (1985), 62 di 112; and 12 CLRBR (NS) 97 (CLRB no. 527), based on the average bank rate of the Bank of Canada (John F. Creamer, September 5, 1986 (LD 561)), from the date of the dismissal to the date of this decision.

The Board determined that it could only grant pre-award interest and that no interest was payable after the Board's decision.

Decisions followed: Canadian Broadcasting Corporation v. C.U.P.E. [1987] 3 F.C. 515; Canadian Broadcasting Corporation (1987), 70 di 132; and 17 CLRBR (NS) 43 (CLRB no. 636). (Reconsideration panel decision).

Ordonnance de redressement selon l'article 99 du Code canadien du travail (Partie I -Relations du travail). Détermination des sommes dues à un employé congédié pour activités syndicales (paragraphe 94(3) du Code). Fixation du quantum.

Le plaignant a été congédié en 1989, réintégré à l'été 1990, mais n'a jamais été indemnisé.

L'indemnité doit être l'équivalent présent au sens plein du terme, de la rémunération perdue.

Le Conseil a passé en revue la façon de déterminer le montant de l'indemnité fixée selon le sous-alinéa 99(1)c(ii) du Code. Le Conseil s'est penché sur l'assurance-chômage, la réduction des dommages [mitigation] les salaires gagnés ailleurs et les intérêts.

Le Conseil a jugé qu'en l'espèce le paiement d'intérêts sur la perte de salaire subie était justifié afin que l'indemnité soit vraiment équivalente à la perte subie.

Les intérêts ont été calculés selon la méthode «simple et rapide» décrite dans la décision Samuel John Snively (1985), 62 di 112; et 12 CLRBR (NS) 97 (CCRT no. 527), au taux d'escompte moyen de la Banque du Canada (John F. Creamer, 5 septembre 1986, (LD 561)) jusqu'à la date de la présente décision.

Le Conseil a néanmoins déterminé que l'intérêt ne pouvait courir au-delà de la présente décision.

(Décisions suivies: Société Radio-Canada, [1987] 3 C.F. 515; Société Radio-Canada (1987), 70 di 132; et 17 CLRBR (NS) 43 (CCRT no. 636). (Décision d'un banc de révision).



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Reasons for decision

William Quérel,
complainant,
and
Larose-Paquette Autobus Inc.,
respondent.

Board File: 745-3425

The Board was composed of Mr. Serge Brault, Vice-Chairman, and Mr. J. Jacques Alary and Mrs. Evelyn Bourassa, Members.

Aparances

Mr. Jean-François Beaudry, for William Quérel; and
Mr. Robert Fauteux, for Larose-Paquette Autobus Inc.

These reasons for decision were written by Mr. Serge Brault, Vice-Chairman.

I

In this decision the Board determines the amount of compensation it ordered after allowing a complaint of dismissal for union activities (see Larose-Paquette Autobus Inc. (1990), 80 di 105 (CLRB no. 792)).

That decision contained the following remedial order in respect of William Quérel (the complainant):

"The Board therefore declares unlawful and rescinds Mr. Quérel's dismissal.

...

... the Board ... hereby does order that Paquette reinstate immediately Mr. Quérel in the same position he occupied on October 22, 1989 and that it compensate him in accordance with section 99, as if he had never been dismissed, ...

...

The Board retains jurisdiction should any problem arise in implementing the present remedies. ...

Finally, the Board reserves the right to issue a formal order and to take any further remedial action as a result of the unfair labour practice committed against Mr. Quérel."

(pages 133-134)

That decision, issued on April 23, 1990, rescinded a dismissal that took effect on October 22, 1989. Mr. Quérel was reinstated in his duties on June 4, 1990. His dismissal therefore lasted 32 weeks. However, 127 weeks have thus far passed since his dismissal, i.e., since the financial loss began to accrue, and he has still not been compensated.

Despite the parties' efforts and the numerous discussions they appear to have held, they were unable to agree on the compensation owed. In the meantime, the Board received ample documentation setting out the claims of one side and the arguments of the other side regarding the specific amounts owed. This documentation includes the statements of earnings and hours worked by Mr. Quérel in the years preceding his dismissal. The Board also received statements of income tax paid on earnings or unemployment insurance collected at the relevant times. However, a mistake may have been made regarding 1986 earnings that appear to have been confused with 1988 earnings. This, however, has no bearing for our purposes.

All this serves to indicate that the Board did not deem it appropriate to hold a public hearing in this matter, which it decided on the basis of the written submissions of each party.

II

The Claim

The complainant is claiming a total of \$18,583.60. Lost overtime, expenses and other unspecified damages account for approximately 50% of this amount. Finally, it includes interest of some \$1,500.00 accrued on the unpaid amount to date. According to the complainant, the interest should also continue to accrue beyond the date of the Board's decision.

Larose-Paquette Autobus Inc. (the employer) altered its position a number of times, from an initial offer of \$3,500.00 to its last offer of nothing at all.

III

Rules for Calculating Compensation

The relevant provisions of the Code stipulate the following:

"99.(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with ... section ... 94 ..., the Board may, by order, require the party to comply with or cease contravening that ... section and may

...

(c) in respect of a failure to comply with paragraph 94(3)(a), (c) or (f), by order, require an employer to

...

(ii) pay to an employee or other person affected by that failure compensation not exceeding such sum as, in the opinion of the Board, is equivalent to the remuneration that would, but for that failure, have been paid by the employer to that employee or other person, ..."

It is up to the Board to determine the amounts owed the complainant having regard to what, in its opinion, is the

equivalent of the remuneration lost, without exceeding this sum.

The Board has explained before in a letter decision (Nationair (Nolisair International Inc.), December 11, 1987 (LD 635)) its method of determining and calculating precisely the compensation owed in these circumstances. It has never really done so in a formal decision, and hence these Reasons for decision.

Remuneration Lost and Earnings from Other Employment

Pay at the time of dismissal is the starting point. For a person who is paid weekly, it is on this basis that the loss must be assessed. This is the so-called reference period.

A second rule requires that the Board take into account amounts earned elsewhere during the period; by this, we mean earnings from a job. A credit is therefore owed the employer for earnings from other employment.

Should this be a lump-sum credit, or should it accrue over time? It is better to determine compensation on the same basis as the losses accrue. Thus, in the interests of fairness, we will make this determination on a weekly basis in the case of the employee who is paid by the week. In practice, an employee who is unlawfully dismissed for 20 weeks and who manages to make substantial earnings in a single week will, on the basis of this week alone, through these earnings, make up the loss suffered, to a maximum of 100% of the remuneration lost during the week in question. Moreover, unemployment insurance or private income insurance plans use a similar method. Credits in the form of earnings from other employment therefore range from 0 to 100% per reference period.

In this case, Mr. Quérel was paid weekly. Having said this, the Board notes that the complainant did not object to his total employment earnings, namely \$702, being credited to the employer. It is therefore on the same basis that the amounts owed should be determined and earnings from other employment deducted from these amounts.

Mitigation of Damages

By mitigation of damages, we mean the obligation imposed on an individual to try to reduce the damages suffered. In this case, this would mean the obligation on the part of Mr. Quérel to seek employment during the period of his dismissal. In accordance with this theory, the employer could require that the compensation it owes be reduced if the dismissed employee has made no real effort to find employment during his dismissal. As the Board has explained before, it does not apply the so-called mitigation rule (see Samuel John Snively (1985), 62 di 112; and 12 CLRBR (NS) 97 (CLRB no. 527), application for review in the Federal Court of Appeal abandoned (Court file no. A-439-87, April 29, 1988); Gerald M. Massicotte (1980), 40 di 11; [1980] 1 Can LRBR 427; and 80 CLLC 16,014 (CLRB no. 234), affirmed by the Federal Court in Teamsters Union Local 938 et al. v. Gerald M. Massicotte et al., [1982] 1 F.C. 216, and by the Supreme Court in Teamsters Union Local 938 et al. v. Gerald M. Massicotte et al., [1982] 1 S.C.R. 710; and Frederick Transport Limited v. United Food and Commercial Workers International Union et al., no. A-747-88, November 17, 1989 (F.C.A.)). In passing, the employer did not invoke the obligation to mitigate in the instant case.

Unemployment Insurance

How are unemployment insurance benefits to be treated?

In determining the amounts the employer owes its employee, the Board will take into account earnings from other employment, but not the unemployment insurance benefits received. As the Supreme Court stated in Jack Cewe Ltd. v. Gary William Jorgenson, [1980] 1 S.C.R. 812:

"I do not find it necessary to consider whether, due to the time element, respondent will be entitled to retain the unemployment insurance benefits which were allowed to him at a time when he was being denied compensation for his wrongful dismissal. Even if it should happen that he will not now be obliged to reimburse them, this is a matter between him and the unemployment insurance authorities, it does not concern the appellant company."

(page 819)

This does not mean, however, that the employee is entitled to recover the lost salary and retain the unemployment insurance benefits. On the contrary, the intent is rather that the unemployment insurance benefits received be returned to the government, and not credited to the party that contravened the Code. In fact, to proceed otherwise would mean that the unemployment insurance fund would pay part of the compensation owed by the employer who contravened the Code.

Accordingly, in calculating the compensation due, the Board will not take into account the unemployment insurance benefits received by the complainant. However, the complainant will have to settle the matter with the unemployment insurance office once he has received compensation. In our view, a complainant's counsel or representative is responsible for ensuring that the client does so as soon as the employer has paid compensation.

Interest

Should interest be part of the compensation owed? Strictly speaking, no. However, there is no single answer to this question (Snively, supra). As a rule, the Board does not order the payment of interest, and rarely does a decision ordering remedial action mention the payment of interest. In the final analysis, this question is left to the discretion of the Board panel hearing the complaint. This is the conclusion of a reconsideration panel of the Board constituted further to the decision of the Federal Court of Appeal in Canadian Broadcasting Corporation v. C.U.P.E., [1987] 3 F.C. 515, to which we will return later. (The decision of the reconsideration panel is reported in Canadian Broadcasting Corporation (1987), 70 di 132; and 17 CLRBR (NS) 43 (CLRB no. 636).)

This attitude toward interest counterbalances somewhat our policy on mitigating damages: the victim has no strict obligation to find employment; however, if the person does not do so and simply hopes to be compensated, that person has no guarantee that the amount of the compensation will include interest. There is give and take: the employee is not obliged to mitigate the damages, but the employer is not necessarily liable for interest.

In the instant case, the complainant was reinstated nearly two years ago. He is still waiting to be compensated. According to the file, he has received no payment, although the employer acknowledged, at least at one time, a debt of some \$3,000 owing to the complainant. As for the reason given for suggesting later that it owed the complainant nothing, this reason has no validity.

In this case, if the compensation paid to Mr. Quérel really is to be equivalent to the remuneration he would have

received, we will have to take this into account. The harm done to him did not end on June 4, 1990; on the contrary, it has continued right up to the present, for nearly two years after his reinstatement and for more than two years after his dismissal in October 1989.

Obviously, the harm he suffered at the outset strictly from the loss of pay was compounded as the weeks passed. Each new week without pay between October 1989 and June 1990 itself meant another loss added to that accumulated as of the previous week. Another loss, moreover, resulted from the delay in payment.

In each case of this kind that it hears, the Board is careful to determine the compensation that is the present equivalency of the remuneration that would have previously been paid. Interest can thus enter into the determination.

In Nationair, supra, the Board followed the policy advanced in Snively, supra, concerning payment of interest. The latter case involved compensation owed under section 134 of the Code (Part II - Occupational Safety and Health) before the 1985 revision, following a dismissal. To the extent that this former provision and the present section 99 of Part I are worded similarly and their purpose is to compensate the same kind of losses, it is reasonable to interpret and apply them consistently in comparable circumstances.

The text of section 99(1)(c)(ii) of Part I is essentially the same as the text of the present section 134(c) of Part II, which replaced section 96(3)(c) during the 1985 revision. One thing is clear: their purpose is the same, i.e. redress; they are not punitive. The in-depth analysis of this provision done by the Federal Court of Appeal, per MacGuigan, J., in Canadian Broadcasting Corporation v.

C.U.P.E., supra, has lost none of its interest or relevance since the Code was amended. On the contrary, the clear difference that used to exist between the wording of these two provisions has disappeared to the extent that, for all practical purposes, the two texts are identical. Now, as then, it is when the compensation is decided, and hence at the time of the decision, that the Board must determine the compensation that is "equivalent to the remuneration" (section 99(1)(c)) that the complainant was denied.

In Canadian Broadcasting Corporation v. C.U.P.E., supra, the Federal Court of Appeal had before it an application for judicial review to set aside a Board decision issued pursuant to the predecessor of the present section 134 of Part II (formerly Part IV) of the Code. The case involved an employee denied overtime work, an action which the Board found unlawful (see John F. Creamer (1985), 62 di 204 (CLRB no. 534)). Mr. Creamer had not been compensated and the Board had to determine the amounts owed the complainant (John F. Creamer, September 5, 1986 (LD 561)). It is this letter decision that the Federal Court of Appeal was asked to set aside in Canadian Broadcasting Corporation v. C.U.P.E., supra.

The Board had also been asked to reconsider, in plenary session, the above-mentioned letter decision of September 5, 1986, under section 18 of the Code, which it refused to do (Canadian Broadcasting Corporation, supra).

The Federal Court of Appeal, per MacGuigan J., had the following to say in Canadian Broadcasting Corporation v. C.U.P.E., supra:

"... in my opinion, the key words in the paragraph are 'compensation' and 'equivalent'. 'Compensation' is defined as follows in Black's Law Dictionary, 5th ed., 1979:

'Compensation. Indemnification; payment of damages; making amends; making whole; giving an equivalent or substitute of equal value. That which is necessary to restore an injured party to his former position. Remuneration for services rendered, whether in salary, fees, or commissions. Consideration or price of a privilege purchased.'

It is true that the word does bear the limited meaning of remuneration urged by the applicant, but its primary sense is rather 'making amends' or 'making whole'.

This interpretation is strengthened, I believe, by the notion of equivalency that is explicit in the paragraph under consideration. The compensation awarded may be equivalent to the remuneration that would have been paid but for the employer's contravention. In my view, the very tense structure (is equivalent, that would have been paid) suggests that what Parliament intended as the limit of compensation was not past equivalency but present equivalency, i.e., not the same nominal amount of money that would have been paid in the past but the present equivalent of that amount (is equivalent to). Parliament's emphasis on the subjective discretion of the Board ('such sum as, in the opinion of the Board, is equivalent') strengthens the impression that the fullest sense of equivalency was what it intended.

This was clearly the Board's conclusion in holding that 'the foregoing interest required to be paid is part of Mr. Creamer's actual loss of remuneration while he was removed from the crew'. Indeed, these words of the Board show that the sum of money in question was conceptualized by it in the very formula approved by Dickson J. (as he then was) for the Supreme Court of Canada in Lewis v. Todd and McClure, [1980] 2 S.C.R. 694, at page 717, 'not as interest but as part of the award'. Whether the sum is categorized as interest or as part of the award, I can find no fault with such an interpretation on a plain meaning basis. It is, I believe, in keeping with the plain meaning of the paragraph."

(pages 520-522; emphasis added)

The Board does not see how an amount that has been frozen for two years and still unpaid would be the present equivalent of what it was then. This nominal sum should therefore be adjusted in order to determine its real present equivalency. This can be done by adding on interest. For the reasons given in Snively, supra, and John F. Creamer (LD 561), supra, this interest is part of the losses suffered by a complainant. (See also in this regard Re Westcoast

Transmission Co. Ltd. and Majestic Wiley Contractors Ltd.
(1982), 139 D.L.R. (3d) 97 (B.C.C.A.).)

Calculation and Period of Interest

How is interest to be calculated and for what period? The calculation is to be done using the "rough and ready" method inspired by our Ontario counterparts and adopted by the Board in Snively, supra.

This method is described as follows by the Ontario Board in Hallowell House Limited, [1980] OLRB Rep. Jan. 35:

"33. ... For its ease of calculation, flexibility and basic accuracy, therefore, the Board has concluded that a calculation of interest on the Board's monetary awards should be carried out as follows: firstly, ... assess the wage portion of the compensation award; secondly, divide it in half; lastly, apply the appropriate annual interest rate pro-rated to reflect the proportion of the year represented by the compensation award.

(pages 45; emphasis added)

As for the period, it is determined on the basis of the number of weeks between the dismissal and "[the date] of the handing down of the award" (Re Westcoast Transmission Co. Ltd., supra, cited in Snively, supra). However, for the reasons given by our colleague, Vice-Chairman Eberlee, in John F. Creamer (LD 561), supra, the Board cannot order that the compensation that it determines in its decision itself bear interest beyond the date of this decision. (Without deciding the matter, this might be possible if our decision were one day filed in the Federal Court under section 23, thereby acquiring "the same force and effect ... as if the order or decision were a judgment obtained in the Federal Court" (section 23(3) of the Code).)

Rate of Interest

What should the rate of interest be? Without excluding other solutions, the Board had opted, in John F. Creamer (LD 561), supra, for the prime rate of the Bank of Canada.

IV

Calculation of Compensation

We must first determine the nominal amount of remuneration lost each week until the reinstatement on June 4, 1989. The complainant was paid by the hour, and his hours of work varied seasonally. To calculate his losses, the Board reviewed his various statements of hours worked during the preceding year, including overtime. We also checked the hours worked by others during his absence, in order to obtain a weekly average. Based on a sampling of hours worked every other week, the Board concludes that Mr. Quérel would have been paid, on average, for 34 hours a week during the period when he was unlawfully denied work. This average of 34 hours takes into account seasonal variations and the overtime he worked, which on average is minimal. In this regard, the file shows that there was only occasional overtime. Moreover, the claim does not contain any specific information that would enable us to make a more generous award for such work.

With regard to the rate of pay, Mr. Quérel was paid by the hour. Until February 1990, the employees' hourly rate of pay was \$7.90. It then rose to \$9.00 an hour, where it stayed up until reinstatement. We will therefore make the appropriate adjustments.

The Board therefore calculates as follows (rounded off to the nearest \$10) the nominal amount of the loss of pay suffered by Mr. Quérel during his 32-week absence:

$$18 \text{ weeks} \times 34 \text{ hours} \times \$7.90 = \$4,834.80$$

$$14 \text{ weeks} \times 34 \text{ hours} \times \$9.00 = \$4,284.00$$

$$\text{TOTAL: } \$9,118.80$$

(rounded off to) \$9,120.00

Had Mr. Quérel been paid each week, he would have received, in our estimation, \$9,120.00 between October 1989 and June 1990. Such, however, was not the case and he has yet to be paid to this day. In the instant case, this amount should be updated to determine the amount that today constitutes, in our opinion, the present equivalency of the loss suffered.

A check by our research services with the Bank of Canada shows that between October 1989 and March 1992, the prime rate fluctuated, from a high of 14% in May 1990 to the present low of approximately 7%. A rate of 10% applied for the duration of the period in question is equitable, the average being slightly higher. This is the rate we will apply in the instant case.

As we stated earlier, 127 weeks have passed since Mr. Quérel's dismissal. Expressed as a formula, the following is a so-called "rough and ready" method, described earlier, of calculating interest between the date of Mr. Quérel's dismissal and the date of this decision:

$$\frac{\text{TOTAL AMOUNT OF INTEREST}}{2} = \frac{\text{unpaid salary}}{2} \times \frac{\text{annual prime rate}}{52 \text{ weeks}} \times \frac{127 \text{ weeks}}{52 \text{ weeks}}$$

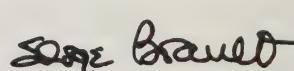
$$\$1,110 = \frac{\$9,120}{2} \times \frac{10\%/\text{annum}}{52 \text{ weeks}} \times \frac{127 \text{ weeks}}{52 \text{ weeks}}$$

Using all this information, we are now able to update the nominal loss to determine the compensation that is equivalent to the remuneration lost.

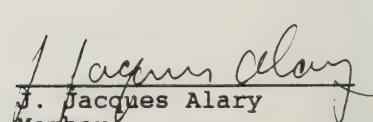
Equivalent compensation:	Nominal loss + interest (minus) earnings from other employment
	\$9,120 + 1,110 = \$10,230
	minus: (\$ 702)
	\$ 9,528

The Board therefore orders the employer to pay the complainant the sum of \$9,528 within the seven days following receipt of this decision. It will be up to the complainant to settle up with the unemployment insurance office as soon as the employer makes payment, and to his counsel to ensure that he does.

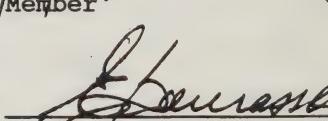
The Board reserves the right to make a formal order and, failing compliance, to file its decision with the Federal Court, if necessary, upon request made pursuant to section 23 of the Code.



Serge Brault
Vice-Chairman



J. Jacques Alary
Member



Evelyn Bourassa
Member

ISSUED at Ottawa, this 10th day of April 1992.

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SUMMARY

UNITED MINE WORKERS OF AMERICA, DISTRICT NO. 26, APPLICANT, AND THOMAS I. REID AND JOHN L. TAYLOR, RESPONDENTS.

Board File: 530-1992

Decision No.: 925

RÉSUMÉ

LES MINEURS UNIS D'AMÉRIQUE, CONSEIL DE DISTRICT NO 26, REQUÉRANT, ET THOMAS I. REID ET JOHN L. TAYLOR, INTIMÉS

Dossier du Conseil : 530-1992

Décision n° : 925

In this decision the Board, sitting in plenary session, dismissed an application for reconsideration of a decision in which it was held that a union had violated section 95(h) of the Canada Labour Code when it penalized two of its members for refusal to perform an act contrary to Part I of the Code. The members had refused to perform picket line duty in support of an illegal strike and as a result the union refused them strike pay. The majority of the original panel found that the complainants had refused to perform "strike duty" in support of an illegal strike. It also found that the withholding of the payment constituted a form of penalty. Accordingly it held that the complainants had been penalized for refusal to perform an act contrary to Part I of the Code.

An eleven member majority of the plenary session held that the decision by a union to deny strike pay can constitute the taking of disciplinary action within the meaning of section 95(h). The majority also ruled that while picketing is not itself properly characterized as being or not being contrary to Part I of the Code, it may, in certain circumstances, be a kind of strike or concerted activity on the part of employees in relation to their work that is designed to restrict or limit output and may, in some circumstances, be an activity contrary to Part I. The majority also found that the facts before it could be found to be a violation of section 95(h).

Two dissenting members of the plenary session were of the view that questions of law and of policy arise from this application for reconsideration which ought to be dealt with by the full Board. These questions arise from the fact that the circumstances giving rise to the original complaint are beyond the Board's statutory mandate under the Code, i.e., the standards of trade union rules regarding the distribution of strike pay and the legality of strike duties, in particular picketing.

Dans ces motifs, le Conseil réuni en séance plénière a rejeté une demande de réexamen d'une décision dans laquelle il avait été jugé qu'un syndicat avait enfreint l'alinéa 95h) du Code canadien du travail en pénalisant deux de ses membres pour avoir refusé de poser un geste contraire à la Partie I du Code. Les membres avaient refusé de faire du piquetage pour appuyer une grève illégale et le syndicat avait donc refusé de leur verser une indemnité de grève. La majorité des membres du banc initial ont jugé que les plaignants avaient refusé de faire du piquetage pour appuyer la grève. Ils ont également jugé que le fait de ne pas verser l'indemnité constituait une forme de sanction. Par conséquent, ils ont jugé que les plaignants avaient été pénalisés pour avoir refusé de poser un geste contraire à la Partie I du Code.

Une majorité constituée de onze des membres réunis en séance plénière a jugé que la décision d'un syndicat de refuser de verser une indemnité de grève pouvait être considérée comme une mesure disciplinaire au sens de l'alinéa 95h). La majorité a également décidé que même si le piquetage ne comporte pas en lui-même la caractéristique d'être ou de ne pas être contraire à la Partie I du Code, il peut dans certaines circonstances, constituer un genre de grève ou d'activité concertée de la part des employés en regard de leur travail destinée à réduire ou limiter la production et peut, dans certaines circonstances, être une activité contraire à la Partie I. La majorité a également jugé que les faits qui lui avaient été présentés pouvaient constituer une violation de l'alinéa 95h).

Deux membres dissidents du Conseil réuni en séance plénière étaient d'avis que cette demande de réexamen soulevait des questions de droit et de principe qui devaient être examinées par tous les membres du Conseil. Ces questions découlent du fait que les circonstances donnant lieu à la plainte initiale dépassent le mandat conféré au Conseil par le Code, c.-à-d. les normes visant les règlements des syndicats en ce qui a trait à la distribution des indemnités de grève et la légalité des activités de grève, en particulier le piquetage.

It was the view of the dissenting members that in the absence of evidence to the contrary, the original panel relied on a presumption that the strike duties in question here were contrary to Part I of the Code because they were done in conjunction with an unlawful strike. They also considered that there were serious doubts whether the application of the union's strike fund rule in these circumstances could be construed as the imposition of a penalty for the purposes of section 95(h) of the Code. The minority would have adopted a policy whereby there is an onus on a complainant under section 95(h) to show that the specific act that is required to be done is in itself contrary to Part I of the Code. This onus ought not to be overridden by a presumption on the Board's part. Such a policy would achieve the purposes of the Code vis-à-vis section 95(h) and it would also balance the collective interests of trade unions with the rights of individuals.

Les membres dissidents étaient d'avis qu'en l'absence de preuve du contraire, le banc initial s'était appuyé sur la présomption que les activités de grève en cause étaient contraires à la Partie I du Code parce qu'elles avaient été exécutées dans le cadre d'une grève illégale. Ils estimaient également qu'il était plutôt douteux que l'application du règlement relatif au fonds de grève du syndicat dans ces circonstances pouvait être considérée comme une imposition d'une sanction aux fins de l'alinéa 95h) du Code. La minorité aurait adopté une ligne directrice selon laquelle il incombe au plaignant en vertu de l'alinéa 95h) de montrer que le geste précis exigé est en lui-même contraire à la Partie I du Code. Cette charge ne devrait pas être annulée par une présomption du Conseil. Une telle ligne directrice servirait aux fins de l'alinéa 95h) et équilibrerait également les intérêts collectifs des syndicats et ceux des individus.

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REASONS FOR DECISION

United Mine Workers of America,
District No. 26,

applicant,

and

Thomas I. Reid and John L. Taylor,
respondents.

Board File: 530-1992

The Board was composed of the following members, sitting in plenary session: J.F.W. Weatherill, Chairman; Hugh R. Jamieson, Thomas M. Eberlee, Serge Brault, Louise Doyon and J. Philippe Morneault, Vice-Chairs; and Calvin B. Davis, Ginette Gosselin, Evelyn Bourassa, J. Jacques Alary, Michael Eayrs, François Bastien and Mary Rozenberg, Members.

Appearances (on record):

Mr. N. Blaise MacDonald, for the applicant; and Messrs. Thomas I. Reid and John L. Taylor, for themselves.

The reasons for this majority decision of the Board were written by Chairman J.F.W. Weatherill. Vice-Chair Hugh R. Jamieson dissented with Member Calvin B. Davis concurring with the dissent.

This is an application for reconsideration of the decision of the Board in File No. 745-3777, Reid and Taylor and United Mine Workers. A majority of the panel in that case (Vice-Chairman Eberlee and Board Member Eayrs) found that by withholding certain sums of money from the complainants in the course of distributing the contents of a strike fund, the respondent union had imposed a form of penalty on them. The complainants (respondents in this review application) had, so the majority found, refused to perform "strike duty". The complainants were not eligible to receive payments from the fund under the union's rules. The "strike duty" however was, it seems clear, in support

of a strike which the Board, in another application, had determined to be unlawful.

The majority of the panel concluded that in the circumstances the complainants had been penalized for refusal to perform an act contrary to Part I of the Canada Labour Code. It was held that that was a violation of section 95(h) of the Code, and the union was ordered to pay to the complainants the amounts of money which had been withheld from them.

Board Member Davis dissented. He was of the view that the complainants had withdrawn their services and were participating in the unlawful strike. They had refused to do picket duty, but since picketing is not regulated by the Code, they could not, it was argued, be said to have refused to do anything contrary to Part I. It was Mr. Davis' further view that to be denied strike pay because of a failure to perform assigned tasks could not be construed as imposing a penalty within the meaning of section 95(h).

There is no doubt that there was an unlawful strike, and that the union persisted in continuing that strike despite the Board's order. It is clear from the original decision that the complainants were opposed to the strike.

As the majority of the original panel found, the complainants did not "perform strike duty". It would appear that the particular strike duty which the complainants did not perform was duty on the picket line, although that is simply a matter of the evidence before the panel in the particular case. That evidence was heard

and weighed, and we see no proper ground on which the original panel's finding on that question of fact should be disturbed.

Not having performed strike duty, the complainants did not receive strike pay. The majority of the original panel found that, having regard to the circumstances of the case, the withholding of the payment constituted a form of penalty. From the union's point of view, of course, the payment was not made because the strike duties were not performed. The union's by-laws, naturally enough, contemplate strike pay in return for strike duty. In the normal course, the Board is not concerned with the propriety of payments made from union funds. The question here, however, is of a different nature: it is whether or not the withholding of payment to the complainants, while such payments were made to others (from the fund to which the complainants had contributed) constituted, in the circumstances of this case, a violation of section 95(h) of the Canada Labour Code. Whether the payment was or was not provided for by the union's internal rules is irrelevant to this question. The decision of the original panel cannot properly be said to constitute an interference in union affairs in any significant sense: it is simply a determination, on the particular facts of the case, that the Code has been violated. That, again, is a finding of the sort which we consider it was open to the panel to make, and there was evidence to support it. It is the sort of determination which section 95(h) contemplates the Board may make.

The material portion of section 95(h) of the Code is as follows:

"No trade union or person acting on behalf of a trade union shall

- - -

(h) expel or suspend an employee from membership in the trade union or take disciplinary action against or impose any form of penalty on an employee by reason of that employee having refused to perform an act that is contrary to this Part; - -"

The purpose of this provision is evident, and the "mischief" at which it is directed easy to discern. "Its general purpose is to prevent unions from demanding a loyalty that will require members to act contrary to the Code" (Foisy, Lavery & Martineau, Canada Labour Relations Board Policies and Procedures (Butterworths, 1986) at p. 354, citing Terry Matus (1980), 37 di 73). See also Bank of Nova Scotia, 21 di 439, at p. 445 and Gerald Abbott, 26 di 543, at p. 553. In Dorsey, Canada Labour Relations Board, Federal Law and Practice (Carswell, 1983), at p. 242, the prohibition in section 95(h) is said to be a "different, more public interest, prohibition" than those set out in sections 95(f) and (g). The most recent commentary on the point is in Clarke, Canada Labour Relations Board, An Annotated Guide (Canada Law Book, 1992), where it is said, "A union may not discipline an employee for refusing to do something that violates the Code. For example, an employee could not be disciplined for refusing to participate in an illegal strike." Mr. Clarke also refers to the Terry Matus case, supra. In Terry Matus, the Board stated, at p. 87 of its decision, that it:

"- - - will not hesitate to interpret strictly the various provisions of the Code where Parliament has introduced checks on the internal affairs of trade unions when their administration has the effect of affecting some of the rights and recourses created by Parliament, for employees coming under the jurisdiction of the Code."

Section 95 sets out a number of prohibitions relating to trade unions and it clearly does so in order to support the general scheme of collective representation and collective bargaining established by the Code. The particular prohibition in section 95(h) may be described as one against reprisals taken against employees who have "refused to perform an act that is contrary to this Part", that is, Part I of the Code. In the instant case, the original panel has found, on the evidence, that the trade union imposed a form of penalty on the complainants, and that it did so by reason of their having refused to perform "strike duty". The only substantial question properly before the Board in this reconsideration application, then, is this: can a refusal to perform strike duty be said - in any circumstances - to be a refusal to perform an act contrary to Part I of the Code? In our view, there may be such circumstances. There is no evidence in this case of the union's taking any formal disciplinary proceedings against the complainants. There is no allegation to that effect, and the matter of "discipline", in that sense, is irrelevant to the question before us. For this reason, section 95(g) of the Code has no bearing on this case. There was, however, evidence that a "penalty" was imposed on the complainants: they were denied the payments which were made to others, and the circumstances of that denial led the majority of the panel to conclude both that it constituted a penalty and that it was imposed by reason of the complainants' having refused to perform an act contrary to the Code.

What did the complainants do? They refused to perform "strike duty" or, more particularly, as appears from the facts as stated in the original decision, they refused to

perform picket duty. There is no need to speculate here on what might have been the panel's finding had the complainants refused to perform some other sort of activity in support of the unlawful strike.

Is refusal to perform "strike duty", or more particularly picket duty, a refusal to perform an act that is contrary to Part I of the Code? This question, we think, can only be answered by considering a particular refusal in its objective context. The act of picketing, in itself and without more, cannot properly be characterized as being or not being contrary to Part I of the Code; indeed the Code is silent with respect to picketing. In a number of decisions, this Board has held that employers who disciplined employees because they engaged in picket line activities were in violation of the Code. These conclusions were reached - correctly, in our view - despite the Code's silence with respect to picketing. See Pacific Western Airlines, (1986) 64 di 150; 12 CLRBR(NS) 316; and 88 CLLC 16,021 (CLRB no. 562), and other cases. Picketing, however, may in certain circumstances be a kind of "concerted activity on the part of employees in relation to their work that is designed to restrict or limit output" (a "strike" within the meaning of section 3(1) of the Code) and thus potentially contrary to Part I. See Gagnon v. Foundation Maritime, (1961) 28 D.L.R. (2d) 174 (S.C.C.), per Ritchie, J., at p. 191, where picketing was found to be for the purpose of creating a situation which would result in a cessation of work constituting a strike, and at p. 197, where it was found that picketers participated in a cessation of work constituting a strike.

This being said, we have now to determine whether or not the original panel considered that the complainants had in fact refused to participate in an action contrary to Part I when they refused to perform picket duty in the particular circumstances of this case, and that the union had penalized them for that reason. Some in the majority would have favoured referring this question to the original panel as a strict question of fact. However, the original panel members being full participants in this reconsideration process, and the majority of them considering that the evidence they heard leads them to conclude that the picket duty in question constituted a strike, it would serve no useful purpose to refer the question back to the original panel for its determination.

We are mindful that in referring this matter to a plenary session of the Board, the reconsideration panel posed three questions. Those questions, with our answers to them, are as follows:

"1. Can the decision by a union to deny strike pay be found to constitute the taking of disciplinary action within the meaning of section 95(h) of the Canada Labour Code?

- Our answer to this question is "yes".

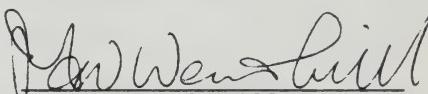
2. Is the refusal to perform picket duty, during a strike which has been found to be unlawful by the Board, considered to be a refusal to take part in an action contrary to Part I of the Canada Labour Code?

- The performance of picket duty cannot by itself properly be characterized as being or not being contrary to Part I of the Code; however, in certain circumstances, it may be a kind of concerted activity on the part of employees in relation to their work that is designed to restrict or limit output (a strike), and thus potentially contrary to Part I.

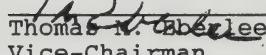
3. On the facts of this matter, as set out in the decision of the majority, can there be found to be a violation of section 95(h) of the Canada Labour Code?

- Our answer to this question is "yes".

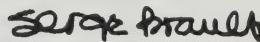
For all of the foregoing reasons, we consider that the decision of the majority of the original panel in this case ought not to be altered, and that this application for reconsideration should be dismissed.



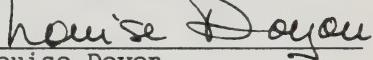
J. F. W.- Weatherill
Chairman



Thomas M. Taberlee
Vice-Chairman



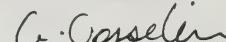
Serge Brault
Vice-Chairman



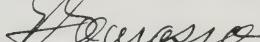
Louise Doyon
Vice-Chair



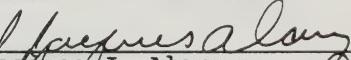
J. Philippe Morneault
Vice-Chairman



Ginette Gosselin
Member for the Board



Evelyn Bourassa
Member for the Board



Jacques J. Alary
Member for the Board



Michael Bayrs
Member for the Board



François Bastien
Member for the Board



Mary Rozenberg
Member for the Board

ISSUED at Ottawa, this 15th day of April 1992.

Dissenting opinion of Vice-Chairman Hugh R. Jamieson

Having had the opportunity to read the opinions expressed by a majority of my colleagues in this matter, I cannot, with the utmost respect, adopt their views of what this application for reconsideration is about. Nor can I agree with the approach they have taken or the conclusions reached. Being mindful that this is a plenary review by the full Board where problems of interpretation or of policy under the Code are the primary concern, I, unlike my colleagues, see some glaring issues of this nature that arise from the majority findings in decision no. 880 which I feel ought to be dealt with.

In this type of review application, where a party is alleging that the original panel wrongly applied a provision of the Code, it goes without saying that it is necessary for the full Board to look at the circumstances in which the particular provision of the Code has been applied to be able to ascertain whether there has been an erroneous interpretation or, if there are some policy issues to be dealt with. In the interest of maintaining the principle that those who hear must decide, this has to be done with the full appreciation that the facts of each case and the weight to be attached to any given fact belong to the quorum that hears them.

With that in mind, it is apparent from decision no. 880, that Messrs. Reid and Taylor did not refuse to participate in the illegal strike per se. They, along with the other union members in the bargaining unit, withdrew their services and, at the time of the refusal, they had not complied with the Board Order of August 18, 1990 that required, among other things, that all members of the union return to work and perform the duties and functions of

their employment. At the time of the refusals, Messrs. Reid and Taylor were clearly participating in the unlawful strike.

What really happened in this case, and it cannot be in dispute from the facts recited in the original decision, was that during the unlawful strike, Reid and Taylor refused to participate in strike duties either on the picket line or elsewhere. This is clear from the finding of the majority at page 8 of decision no. 880:

"By refusing to engage in the illegal strike through the performance of 'strike duty' on the picket line or elsewhere, the two complainants, Messrs. Reid and Taylor, refused to perform an act that is contrary to this Part."

(emphasis added)

Because they did not participate in strike duties, Messrs. Reid and Taylor did not qualify for strike pay under the union's strike fund rules. This was pointed out by the union in its reply to the complaint and which it relied upon for the purposes of its reconsideration application:

"The reason the complainants did not receive monies from the fund was because they, unlike other members of the respondent who either did information picket duty or other such duties as food bank during the labour dispute, did not qualify for payments out of the fund."

(union reply dated Dec.19, 1990 at page 8)

This participatory qualification for strike pay is a requirement of the union's constitution, in particular, Article VI which was adopted by the union membership back in 1982, when the union's strike fund was created. These

provisions make no distinction between legal or illegal strikes:

"Sec.6 Any person who does not do strike duty during a strike, without providing just cause to his Local Union why he cannot perform strike duties shall be denied strike benefits."

Strike duties are not defined in the constitution, however, it is common knowledge that they can take many forms. Union members can be involved in the work of various strike committees; they could be providing transportation to and from the picket lines, they could be doing food bank work as the union pointed out here or, they could simply be making soup and sandwiches or hot coffee for those on picket duty. In this particular case, according to the finding of the majority in decision no. 880, Messrs. Reid and Taylor claimed that they refused to do picket duty, or any other strike duty for that matter, because they did not support the unlawful strike.

Clearly, the majority of the original panel treated strike duties as a manifestation of the unlawful strike for the purposes of section 95(h) of the Code. Nowhere in decision no. 880 do I see any evidence or finding that the strike duties which Messrs. Reid and Taylor refused were, in themselves, contrary to Part I of the Code. It is this assimilation of the illegal strike and strike duties that raises one of the policy issues that causes me some concern.

The other matter that I see as giving rise to a question of interpretation is the finding that the application of the union's strike fund rule to Messrs. Reid and Taylor in

these circumstances constitutes the imposition of a penalty. I appreciate that my colleagues have treated this issue as a question of fact which they imply is a discretionary finding which ought not to be looked at. However, I disagree with that approach. It seems to me that an error by the original quorum in this regard goes much further than an evidentiary assessment.

The imposition of a penalty being one of the prerequisites of section 95(h), an error here would, in my opinion, be an error of law that would fall squarely within the intended scope of a plenary review. (For an overview of the purpose and scope of plenary reviews by the full Board, see British Columbia Telephone Company (1979), 38 di 124; [1980] 1 Can LRBR 340; and 80 CLLC 16,008 (CLRB no. 220); Wardair Canada (1975) Ltd. (1983), 53 di 184; and 16,005 (CLRB no. 434); House of Commons et al. (1985), 62 di 225; and 85 CLLC 16,065 (CLRB no. 536); Brewster Transport Company Limited (1986), 66 di 133; and 86 CLLC 16,045 (CLRB no. 580); and Curragh Resources and Altus Construction Services Ltd. (1987), 70 di 186; 18 CLRBR (NS) 122; and 87 CLLC 16,034 (CLRB no. 640)).

Let me start with the rule under which the strike pay was denied and look at it within the statutory setting of Part I of the Code. When one does so, it is immediately evident that there can be no issue about the right of the union to make such a rule. It is also clear that the Board has no statutory mandate to regulate rules of trade unions affecting the distribution of strike funds.

Legislators have recognized for many years now the authority as well as the need for trade unions to regulate

their own affairs and to formulate their own rules. Labour relations statutes, including the Code, have been crafted accordingly to allow for the free exercise of this authority with minimal restrictions only to prevent and remedy abuse. Examples of where Parliament deemed it necessary to legislate standards to protect individual rights in the majoritarian collective bargaining milieu can be found in Part I of the Code where the Board has been given powers to oversee trade union rules regarding membership (section 95(f)); disciplinary standards (section 95(g)); dispatch rules (section 69) and, under section 37 of the Code, the Board supervises the manner in which trade unions handle their grievance-arbitration procedures. When it comes to strike duties and strike pay, however, the Code is silent.

The Code is also silent on picketing which appears to be the strike duty that Messrs. Reid and Taylor specifically refused to perform. This is another topic that Parliament chose not to regulate under the Code. As past Vice-Chair James E. Dorsey explains in Canada Labour Relations Board: Federal Law and Practices (Toronto: The Carswell Company Limited, 1983), that in 1971, prior to the adoption of the Code, Bill 253 did contain a provision which purported to regulate picketing, however, this was dropped in Bill C-183 which eventually became the Code in 1973. Its disappearance was said to be a result of representations from both management and labour, however, Mr. Dorsey put it this way:

"Whether because of the government's temerity or lack of constitutional authority, the right to picket or otherwise express support for a lawful strike has fallen to the disparate common law or statutory rules of the ten provinces and the two territories."

Whatever the reason, there are no provisions in the Code governing picketing and this Board has no jurisdiction over the legality of picketing per se. This makes two areas of collective bargaining over which the Board has no statutory mandate that are before us in this review application, the administration of union strike funds and picketing. This alone should cause the Board to tread warily when asked to apply a provision of the Code to this situation.

Speaking of caution and picketing, I note that my colleagues rely on the Pacific Western Airlines Ltd., (1986), 64 di 150; 12 CLRBR (NS) 315; and 86 CLLC 16,021 (CLRB no. 562) decision of the Board as the "correct" approach to employer discipline related to picketing. For the record, the Board has long since abandoned the "normal picket line activities" test that was adopted in Pacific Western Airlines Ltd., supra. First in Rogers Cable T.V. (British Columbia) Ltd. (1987), 69 di 17; and 16 CLRBR (NS) 71 (CLRB no. 616), and later confirmed in Canada Post Corporation (1989) 78 di 82; 5 CLRBR (NS) 69; and 89 CLLC 16,029 (CLRB no. 749), where the Board said:

"The difficulty the Board had with the 'normal picket-line activities' test when it came to Rogers was to find rational criteria which could be applied with any degree of consistency and which could result in normal picket-line activities being readily distinguished from unlawful activities. For example, in Rogers one picketer was alleged to have thrown coffee over a management person and in defense had pointed out that the coffee had been cold and there had been no injury. This brought it home to the Board the impossibility of the situation; was it normal picket-line activities to throw cold coffee at people but unlawful activities to throw hot coffee and scald someone? Clearly, the Board was heading in a direction where it ought not to be. The PWA decision had taken the Board into the fringes of an area

where Parliament had decided it should not have jurisdiction, i.e., in the 'how' of picketing. This was why the Board retreated from the PWA approach..."

(Canada Post Corporation, supra, pages 90-91; 77-78; and 14,274-14,275; emphasis added)

In cases like the instant complaint where the circumstances giving rise are, on their face, beyond the Board's primary jurisdiction under the Code, the Board could find itself in the same impossible position that it was in Pacific Western Airlines Ltd., supra. If strike duties are routinely presumed to be contrary to the Code because they are done in conjunction with unlawful strikes for the purposes of section 95(h), the Board could be called upon to make extraordinary judgment calls in these areas of internal union affairs into which the Code was surely not intended to reach. For example, how is the Board to distinguish between the various tasks that go to make up strike duties? What if Messrs. Reid and Taylor had simply refused to work on a strike committee or, said that they were not making sandwiches for the picketers or doing food bank work? Would the Board have been inclined to intervene? I do not think so. Why then should picketing be singled out from the other strike duties for the purposes of section 95(h), with a presumption that it is contrary to the Code if done in conjunction with an unlawful strike? The obvious answer is that it should not.

This is why it is dangerous, in my respectful opinion, to make presumptions about strike duties, and in particular picketing, vis-à-vis being contrary to the Code because it is being done in support of an unlawful strike. Such a presumption does not take into account that the actual picketing being refused could be quite lawful and not be

contrary to the Code. For example, a perfectly legal peaceful information picket line could be mounted during an unlawful strike at government buildings or elsewhere to solicit support for the underlying cause of the labour dispute that led to the work stoppage. In this particular case, the union claimed that the picket duty was to be informational. Messrs. Reid and Taylor said they refused to picket because they did not support the illegal strike. Neither statement determines the lawfulness of the picket duty being refused for the purposes of section 95(h). For there to be a violation of this section of the Code, the specific act that is being refused must in itself be contrary to Part I. As I said at the outset, I see no evidence of this in decision no. 880.

For all of the foregoing reasons, it is my opinion that it would be wise for the Board to adopt a policy whereby the refusal to participate in an unlawful strike for the purposes of section 95(h) of the Code does not necessarily include the refusal to participate in strike duties. For the purposes of this section of the Code, there has to be an onus on the person complaining to show that the specific act required to be done by the union is indeed contrary to Part I of the Code. This onus should not be overridden by a presumption on the Board's part. Such a policy would achieve the purposes of the Code vis-à-vis section 95(h) and it would also balance the collective interests of trade unions with the rights of individuals.

Turning to the question of whether the application of the union's strike fund rule constitutes the imposition of a penalty within the meaning of section 95(h), I agree with the observations of my colleagues about the general purpose

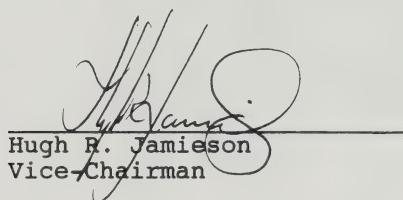
of this provision and that it is a "different, more public interest prohibition" than sections 95(f) and (g). However, I see nothing in the rule that offends the public interest. This type of rule is common to most union strike funds and the object of the no participation - no strike pay rules have little or nothing to do with penalizing members for failing to take part in illegal strikes. They are but one aspect of trade unions' standards of membership behaviour that are aimed at commanding loyalty and encouraging solidarity within the rank and file. Such rules are formulated and adopted by the membership at large and they are well within the scope of the authority of trade unions to regulate their own affairs. (See Fred J. Solly (1981), 43 di 29; [1981] 2 Can LRBR 245; and 81 CLLC 16,089 (CLRB no. 296; and Paul Horsley et al. (1991), unreported Board decision no. 861). Naturally, trade unions cannot command a loyalty to the extent that members are required to break the law, however, it takes a rather vivid imagination to suggest that this was one of the goals when these particular strike fund rules were adopted in 1982.

The rule itself is a standard strike fund provision which, in my view, should not attract over-reaction because it is being applied in an unlawful strike situation. The no strike duty - no strike pay philosophy is a well accepted norm in the trade union movement and, even in legal strike scenarios, there are those who elect not to do strike duty for a variety of reasons, including opposition to the reasons why strike action is being taken. In these situations, there is no disciplinary action taken against those who refuse, provided that they have withdrawn their services; they simply do not qualify for strike pay. This

is no more offensive in the public interest than an employer expecting loyalty from its non-employee management staff during a strike or lock-out by requiring them to do the work of the employees who are on strike or who have been locked out. If they refuse, they can expect to sit at home with no pay for the duration of the labour dispute. These are the realities of our adversarial collective bargaining system which Parliament chose not to regulate. Therefore, in my respectful opinion, the Board should refrain from interfering with the standard of union rules in this area unless it is absolutely necessary.

There is no evidence in this particular case of disciplinary measures being taken against Messrs. Reid or Taylor and, for the purposes of section 95(h) a penalty must surely be taken to mean that someone has been treated in a manner in which they would not have been treated but for the refusal and that they have been deprived of something to which they would otherwise have been entitled. I note that my colleagues have subtly described the non-payment of strike pay to Messrs. Reid and Taylor in these circumstances as the withholding of certain sums of money from the complainants. That leaves a false impression of entitlement to strike pay because one pays into the strike fund. This is not so, as in most of these insurance type funds, like unemployment insurance for example, there are qualifications that must be met. Here, it is participation in strike duties. From what I can see, the union applied its strike pay rules as it always has and, under these rules, Messrs. Reid and Taylor were simply never entitled to strike pay.

I would allow the application for reconsideration by the union and would have referred the matter back to the original panel to be dealt with within the framework of the foregoing policies.



Hugh R. Jamieson
Vice-Chairman

I concur with this dissenting opinion.



Calvin B. Davis
Member

CLRB/CCRT - 925

ISSUED at Ottawa, this 15th day of April 1992.

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Information

This is not an official document.
Only the Reasons for Decision can
be used for legal purposes.

SUMMARY

Canadian Council of Broadcast Unions, Applicant, and Canadian Wire Service Guild, Local 213 of the Newspaper Guild Certified Bargaining Agent, and National Association of Broadcast Employees And Technicians, Certified Bargaining Agent, and Association of Television Producers and Directors (Toronto), Certified Bargaining Agent, and Canadian Television Producers' and Directors' Association, Bargaining Agent, and National Radio Producers' Association, Certified Bargaining Agent, and Alliance of Canadian Cinema, Television and Radio Artists, Bargaining Agent, and Canadian Union of Public Employees, Certified Bargaining Agent, and Canadian Broadcasting Corporation, Employer, and CBC Managers' Association and Claude Latrémouille, intervenors.

Board File: 555-3324
555-3326
555-3327
555-3328
555-3329
530-1827

Decision No.: 926

Interim Decision

Application for the certification of a newly formed council of trade unions. Section 32 (Canada Labour Code (Part I - Industrial Relations). Application denied as filed.

This case deals with a set of five (5) applications for certification filed under Section 32 of the Code by the

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

RÉSUMÉ

Canadian Council of Broadcast Unions, requérant et Guilde des services de presse du Canada, section locale 213 de la Guilde des journalistes, agent négociateur accrédité et Syndicat national des travailleurs et travailleuses en communication, agent négociateur accrédité et Association of Television Producers and Directors (Toronto), et agent négociateur accrédité, et Association canadienne des réalisateurs de télévision, agent négociateur et Association nationale des réalisateurs de la radio, agent négociateur accrédité, et Alliance des artistes canadiens du cinéma, de la télévision et de la radio, agent négociateur et Syndicat canadien de la Fonction publique, agent négociateur accrédité, et Société Radio-Canada, employeur, et Association des cadres de Radio-Canada, et Claude Latrémouille, intervenants.

Dossier du Conseil: 555-3324
555-3326
555-3327
555-3328
555-3329
530-1827

N° de Décision: 926

Décision partielle

Requête en accréditation par un regroupement de syndicats nouvellement formé. Code canadien du travail (Partie I - Relations du travail. Requête jugée irrecevable.

La présente affaire porte sur cinq (5) demandes d'accréditation présentées par le Canadian Council of Broadcast



Canadian Council of Broadcast Unions. The Council is made up of four unions: the National Association of Broadcast Employees and Technicians (NABET), the Canadian Wire Service Guild (CWSG), the Association of Television Producers and Directors (Toronto) (ATDP), and the Canadian Television Producers' and Directors' Association (CTPDA), all of which are currently bargaining agents for various groups of employees at the CBC. The Board deals with these applications as a single one, the stated objective of the remaining four being simply to ensure that the name of the Council is placed on the ballot for any votes that may be held to select bargaining agents for the bargaining units described in the Board's Decision no. 846. The newly-defined units at the CBC for which the applicant is seeking certification, and in which it already has members are a) Program Production and Presentation Unit no. 1; b) Technical, Trades and General Labour Unit no. 2; and c) Supervisory Personnel Unit no. 4.

The instant application was vigorously opposed by CUPE, ACTRA and the CBC. The lack of constitutional authority on the part of some of the founding unions for forming a council, the inability of the proposed Council to act as a genuine bargaining agent by virtue of the veto power given to each of its constituent unions, and the perpetuation of old jurisdictional rivalries that the Council's structural arrangements would maintain were among the reasons invoked against the application.

For the Council, the application meets all the requirements for certification under Sections 32 and 8 of the Code: it is an organization of trade unions whose status as trade unions is not in dispute; it has a constitution with one of its objects being the regulation of relations between employer and employees and, notwithstanding arguments to

Unions en vertu de l'article 32 du Code à l'égard de quatre syndicats: le Syndicat national des travailleurs et travailleuses en communication (SNTC), la Guilde des services de presse du Canada (GSPC), l'Association des réalisateurs et directeurs de télévision (Toronto) (ARDT) et l'Association canadienne des réalisateurs de télévision (ACRT), tous agents négociateurs de divers groupes d'employés de Radio-Canada. Le Conseil a traité ces cinq demandes comme une seule, les quatre autres ayant tout simplement pour objet de s'assurer que le nom du Canadian Council of Broadcast Unions figure sur les bulletins de vote qui seront utilisés lors de tout scrutin visant à désigner l'agent négociateur des unités de négociation énumérées dans Société Radio-Canada (1991), décision du CCRT no 846, non encore rapportée. Les nouvelles unités pour lesquelles le requérant demande l'accréditation et parmi lesquelles il compte déjà des membres sont: a) le personnel affecté à la réalisation et à la présentation (unité no 1); b) le personnel technique, de métiers et manœuvres (unité no 2) et c) le personnel de supervision (unité no 4).

Le SCFP, ACTRA et Radio-Canada se sont fermement opposés à la présente demande. Parmi les arguments qu'ils soulèvent mentionnons: le fait que les documents constitutifs de certains syndicats fondateurs ne confèrent pas à ceux-ci les pouvoirs nécessaires pour former un regroupement de syndicats; l'incapacité du regroupement proposé d'agir en tant que véritable agent négociateur en raison du droit de véto conféré à chacun des syndicats membres et la perpétuation de l'ancienne "lutte jurisdictionnelle" que favoriserait la structure du Canadian Council of Broadcast Unions.

Le Canadian Council of Broadcast Unions soutient, pour sa part, que la demande réunit toutes les conditions prévues à l'article 32 et à l'article 8 du Code: il s'agit d'un regroupement de syndicats dont le statut de "syndicat" n'est pas contesté; il est doté de statuts dont l'un des objectifs vise la réglementation des relations entre l'employeur et les employés et,

the contrary, has been duly mandated to act on behalf of its constituent unions. Many of the objections raised against the application concern internal union matters over which the Board has limited jurisdiction.

These applications raise two questions:

(a) Is the applicant a council of trade unions within the meaning of the Code?

(b) Should the Council be certified?

With regard to the first question, the Board considers that the Council's constitution appears to meet the formal requirements to be given trade union status under the Code. However, the Board notes that section 32 applications are to be dealt with on substance not merely formalistic requirements.

In examining the detailed and written submissions in the instant case, the Board decides to exercise its discretionary power under Section 32, and not to certify the Council as presently constituted. The Board finds that the set of arrangements put in place in the Council's constitution aim at preserving the existing lines of work jurisdiction at the CBC, a situation that Board's Decision no. 846 (Canadian Broadcasting Corporation (1991), as yet unreported CLRB decision no. 846) meant to eliminate. The Council is offered the opportunity to review and rethink its structural arrangements in the light of this decision, and to advise the Board of any new fact, or development likely to necessitate a re-examination of this application, failing which it will be dismissed.

nonobstant tout argument contraire, il est investi du mandat de représenter les syndicats membres. De nombreuses objections contre la demande ont trait à des conflits internes sur lesquels le Conseil n'a qu'une compétence restreinte.

Ces demandes soulèvent deux questions:

(a) Le requérant est-il un regroupement de syndicats aux termes du Code?

(b) Le requérant devrait-il être accrédité?

Pour ce qui est de la première question, le Conseil estime que les statuts du Canadian Council of Broadcast Unions répondent aux exigences fondamentales du Code concernant le statut de syndicat. Cependant, le Conseil fait remarquer que les demandes présentées en vertu de l'article 32 doivent être traitées quant au fond et non uniquement quant à la forme.

Après avoir examiné en détail les arguments écrits des parties, le Conseil a décidé d'exercer ses pouvoirs discrétionnaires en vertu de l'article 32 et de ne pas accréditer le Canadian Council of Broadcast Unions tel qu'il est actuellement structuré. Le Conseil estime que certaines dispositions des statuts du Canadian Council of Broadcast Unions ont pour effet de maintenir les catégories actuelles d'emplois à Radio-Canada, ce que la décision no 846 du Conseil (Société Radio-Canada (1991), décision du CCRT n° 846, non encore rapportée) vise à éliminer. On invite le Canadian Council of Broadcast Unions à revoir sa structure à la lumière de la présente décision et de faire part au Conseil de tout fait ou événement pouvant entraîner le réexamen de la demande; autrement, celle-ci sera rejetée.

Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

Canadian Council of Broadcast
Unions,

applicant,

and

Canadian Wire Service Guild,
Local 213 of the Newspaper
Guild,

certified bargaining agent,

and

National Association of
Broadcast Employees and
Technicians,

certified bargaining agent,

and

Association of Television
Producers and Directors
(Toronto),

certified bargaining agent,

and

Canadian Television
Producers' and Directors'
Association,

bargaining agent,

and

National Radio Producers'
Association,

certified bargaining agent,

and

Alliance of Canadian Cinema,
Television and Radio Artists,

bargaining agent,

and

Canadian Union of
Public Employees,

certified bargaining agent,

and

Canadian Broadcasting
Corporation,

employer,

and

CBC Managers' Association,

and

Claude Latrémouille,
intervenors.

Board Files: 555-3324
555-3326
555-3327
555-3328
555-3329
530-1827

The Board was composed of Mr. Serge Brault, Vice-Chairman, and Messrs. J. Jacques Alary and François Bastien, Members.

These reasons for decision were written by Mr. François Bastien, Member.

Appearances

Ms. Suzanne Thibaudeau, Q.C., and Mr. Guy Dufort, for the applicant;

Mr. Paul J. Falzone, for the Alliance of Canadian Cinema, Television and Radio Artists;

Mr. Aubrey E. Golden, Q.C., for the Canadian Wire Service Guild, Local 213 of the Newspaper Guild;

Mr. Gaston Nadeau, for the Canadian Union of Public Employees;

Mr. Ronald Pink and Mr. David Roberts, for the National Association of Broadcast Employees and Technicians;

Ms. Cathy Lace and Mr. Jeffrey Sack, Q.C., for the Association of Television Producers and Directors (Toronto) and the Canadian Television Producers' and Directors' Association;

Mr. David W.T. Matheson, for the National Radio Producers' Association; and

Mr. Claude Latrémouille, on his own behalf.

The Applications

This case deals with a preliminary matter raised by an application for certification filed in June 1991, pursuant to section 32 of the Canada Labour Code (Part I - Industrial Relations), by the Canadian Council of Broadcast Unions. The Council is made up of four constituent unions: the National Association of Broadcast Employees and Technicians (NABET), the Canadian Wire Service Guild (CWSG), the Association of Television Producers and Directors (Toronto) (ATPD), and the Canadian Television Producers' and Directors' Association (CTPDA).

Subsumed under this application were also four applications for certification by the Council for the bargaining units currently represented by the constituent unions. The content and purpose of these four applications were stated as follows in the Council's letter of June 26, 1991 to the Board:

"The CCBU has, by separate application, applied to be certified as the bargaining agent for any of the bargaining units at the CBC as described in Board Decision No. 846 in which its constituent unions have members.

The CCBU recognizes the existing bargaining units represented by its constituent unions may no longer be found to be appropriate as a result of the review of the bargaining units at the CBC which is currently underway. The CCBU makes these applications merely to ensure that its name is placed on the ballot for any votes that may be held to select bargaining agents for the bargaining units described in Board Decision No. 846."

(File no. 555-3324)

The issue we must deal with relates to the status of the applicant. Since this issue is common to all four applications, a single decision is warranted; for more clarity we will refer to all these applications as being

a single one.

Section 32 gives the Board discretionary power to certify a council of trade unions where it is satisfied that such a council meets all the requirements for certification under the Code.

This is an interim decision pursuant to section 20 of the Code. It follows extensive written submissions received and final arguments heard on the matter at Ottawa, on January 14, 15 and 16, 1992.

II

Background

This application is part of a series of proceedings relating to the so-called global review of the bargaining units in the English network of the Canadian Broadcasting Corporation (CBC or the employer).

On January 15, 1991, the Board issued an interim decision (Canadian Broadcasting corporation (1991), as yet unreported CLRB Decision no. 846), in which it reduced from twenty-eight to four the number of units deemed appropriate. The outline of these four units was as follows.

1- Program Production and Presentation Unit

All on-air personnel and production employees, except supervisors.

2- Technical, Trades and General Labour Unit

All technical support, maintenance and blue-collar employees, except supervisors.

3- General Administrative Unit

All administrative and administrative support personnel, clerical, white-collar employees, except supervisors.

4- Supervisory Personnel Unit

All employees whose core functions are of a supervisory nature.

In the months following that decision, the main task of the Board has consisted in mapping the precise boundaries of each of these units, i.e. the proper placement of job classifications within each unit, their inclusion or exclusion on managerial or confidential grounds, and their final disposition when still at issue among the parties.

This task, referred to as Phase II in these proceedings, has now practically been completed. Phase III will deal with the matter of determining the bargaining agent for each of the units deemed appropriate by the Board. It is within this context that the present application for certification is to be situated and understood.

III

The Process

The Canadian Council of Broadcast Unions (the Council) is a new creature. It only came into existence following the issuance of Decision no. 846. All its constituent unions currently hold bargaining agent status at the CBC. The Council filed its application for certification on June 24, 1992. Via such an application, the Council

sought to be certified as the bargaining agent for any bargaining unit at the CBC, as outlined by the Board in Decision no. 846, in which its constituent unions have members. This means specifically the Program Production and Presentation Unit (no. 1), the Technical, Trades and General Labour Unit (no. 2), and the Supervisory Personnel Unit (no. 4). In addition, it asked that, if the Board were to decide to hold a vote to select the bargaining agent for any units of the CBC in which the constituent unions of the Council have members, only the Council appear on the ballot in place of its constituent unions.

Filed with the application were the following documents relating to the formation of the Council.

1. A copy of the Constitution of the Canadian Council of Broadcast Unions
2. A copy of the Minutes of the founding meeting of the Canadian Council of Broadcast Unions
3. A copy of the Resolutions passed at the founding meeting of the Canadian Council of Broadcast Unions
4. Copies of Resolutions passed by NABET, the CWSG, the CTPDA and the ATPD, authorizing them to join the Canadian Council of Broadcast Unions

There were extensive submissions and replies to submissions filed with the Board by NABET, GWSG, ATPD, CTPDA, the CBC, the Canadian Union of Public Employees (CUPE), the Alliance Canadian Cinema Television and Radio Artists (ACTRA) and Mr. Claude Latrémouille in response to this application. After considering this abundant

documentation, the Board went back to the parties, requesting additional information, which the Board identified in the following terms:

"The Board considers necessary to any meaningful determination on the status of the Council as a union applying for certification as well as its current authority over the bargaining rights of its member unions, that all the member unions of the Council as well as the Council provide the Board with the following no later than January 10, 1992, with copies to all other parties:

- a) a copy (in both official languages where available) of their current constitution and by-laws (if not already filed in these proceedings) as well as that of any other body they may adhere to if such body has authority over their ability to form a council or to adhere to one, or to otherwise transfer their bargaining rights;
- b) a summary precisely indicating the provisions in their by-laws and constitution under which the member union has adhered to the Council and/or transferred to it any of its bargaining rights;
- c) any further submissions (no more than 5 pages, 8½ x 11", plus authorities) on the issue indicating whether they would wish to call evidence on the issue of the status or authority of the Council."

(Canadian Broadcasting Corporation, December 31, 1991 (LD 969))

A hearing was held on January 14, 15 and 16, 1992 to hear, inter alia, final submissions from the parties on the Council's application for certification. The Board then considered the matter. Before any determination was made, a judgement rendered by Justice Linden from the Federal Court of Appeal, in Canadian Association of Trades and Technicians (C.A.T.T.) Treasury Board and V. Federal Government Dockyard Trades and Labour Council East, (file no. A-191-91, February 19, 1992) was brought to the Board's attention. The court held that the Public Service Staff Relations Board (PSSRB) had erred in law

and exceeded its jurisdiction under the Public Service Staff Relations Act in refusing to certify the labour council on the grounds of deficient provisions in its constitution regarding union democracy. This Board was invited by counsel for the applicant to suspend its deliberations until after the full text of Justice Linden's reasons was issued. The Board rightly agreed and was later provided with a copy of those reasons for judgment together with additional submissions from most parties on the impact of the Court's judgment on this case.

IV

The Issues

The main issue before the Board concerns the trade union status of the applicant. The Council's application was vigorously opposed by the employer as well as by CUPE and ACTRA. The main submissions against the applications differed in scope and emphasis but in one form or another focused on some or all of the following concerns.

- 1- There are difficulties of a legal or technical nature. First, the Council would not be properly constituted. At least two of the constituent unions, i.e. NABET and the CWSG, have failed, according to counsel for CUPE, to meet the procedural requirements set out in their own constitutions regarding the proper transfer of their bargaining rights to the Council; in addition, they have allegedly failed to have the Council's constitution authorized, approved or ratified by all members of the constituent unions. As the operation basically involves the change of

a bargaining agent, it resembles a transfer of jurisdiction under section 43 and, as such, should be held to the same scrutiny and requirements by the Board. There simply exists no evidence that the membership was consulted.

In addition, counsel for ACTRA claimed that, in view of the fact that none of the member unions' constitutions have specific provisions that relate to the establishment of a council or to the transfer of jurisdiction, this lack of enabling provision renders the whole exercise illegal. For counsel, the general law has been stated in Astgen et al. Smith et al. (1969), 7 D.L.R. (3d) 657). As a consequence, any fundamental change to a union's bargaining right regime such as the instant one requires that the matter be put to the membership through the appropriate constitutional procedure.

- 2- The Council's internal operations are also at issue. Even assuming the Council were properly in existence, it lacks the necessary attributes to act as a true bargaining agent in the three central areas where the role of a bargaining agent is exercised. They are the negotiation of a collective agreement, the decision-making process with regard to strikes, and the administration of a collective agreement. For CUPE, in all these essential fields the authority effectively rests with the member unions not the Council. For instance, no collective agreement can be concluded unless all member unions concur. Each member union has a veto on the negotiation of central issues regardless of the weight of actual membership. The constitutional flaw is such that, according to

counsel for CUPE, the Council does not even have the authority to consult the members over the head of the officers of the founding unions in case of an impasse. For counsel, the wide application of the unanimity rule to all important bargaining matters simply means that the sole and final authority in these matters resides in the constituent unions and not the Council.

The situation would be no different with respect to the administration of a collective agreement and, specifically, the processing of a grievance to arbitration.

- 3- From a labour relations perspective, the basic goal of the Council, as well as its major flaw, is to preserve the integrity and identity of the member unions concurrently with their conflicting work jurisdictions. The set of rules it has given itself in its constitution reflect that overriding concern, be it its stated purpose (Article 2), its definition of jurisdiction (Article 4), or its jurisdictional dispute clause (Article 15). According to CBC's counsel, not only is the organization geared to preserving the jurisdiction of each of the constituent unions but it defines this jurisdiction on this basis of or by reference to the collective agreements in force between the CBC and the member unions.

CBC concludes that, even if the Board found that the Council met all formal requirements of the Code, the Board ought to use its discretion and still refuse to certify it. According to CBC, the Board must refuse to certify unless it is convinced that

such a structure will be conducive to the promotion and enhancement of good working conditions and sound labour management relations. For the employer, the Council's constitutional arrangements will only perpetuate the old jurisdictional battles, and practically annihilate the full effects of the Board's Decision No. 846.

For the Council

The case put forward by the applicant centered around the principles outlined in Bank of Nova Scotia (Cedarbrae Plaza) (1985), 62 di 190 (CLRB no. 533), which counsel for NABET and spokesperson for the Council, Mr. Ron Pink, summarized in the following manner in his letter of December 6, 1991 to the Board:

- "(a) The employer's role in a certification application is to be strictly limited;
- (b) The constitution of an applicant for certification will be read as broadly as possible;
- (c) Technical questions concerning the internal affairs of an applicant for certification will not act as a bar to certification;
- (d) The Board will require the minimum formality in determining if an organization has the status to be certified under the Code."

He concluded:

"These principles are directly relevant to the issues which have been raised by the CBC and other parties in their submissions in these proceedings."

The arguments used by the Council and its constituent unions to support their position went along the following lines.

- 1- The Council took the Board at its word when on numerous occasions it invited the parties to attempt to resolve their differences among themselves rather than to have them determined by the Board. The Council was the constituent parties' response to this invitation, and it was set up with the statutory requirements of Part I, and specifically section 32, clearly in mind.
- 2- The Council as constituted is made up of trade unions, has a constitution that governs its rights and operation, and has been duly authorized by the constituent unions to act on their behalf. Thus, it meets all prerequisites for certification of a council laid down by the Board in its jurisprudence; the test it must now meet is no less and no more stringent than the one applicable to an individual trade union. In addition, the Council is entirely viable and capable of fulfilling its duty as a bargaining agent. The fact that each of its constituent members will have an equal say in the conduct of its business is irrelevant to this proceeding because, after the Council is certified, it will be the only bargaining agent that can legally negotiate and conclude collective agreements with the CBC. And as a certified agent, it will be the only entity capable of administering the collective agreements it enters into.
- 3- The internal organization and workings of the Council are matters that are to be decided and settled by the constituent parties themselves and not ones that labour boards in general, and this Board in particular, have traditionally involved

themselves in, except to ensure there is no prohibition against the formation of a council. When the Board did intervene, it was either to give a broad interpretation of constitutional provisions, focusing instead on the general goals of good labour relations and the enhancement of the employees' bargaining strength (Bank of Nova Scotia (Cedarbrae Plaza), supra) or, as in the case of Marine Atlantic Inc. (1990), 91 CLLC 16,001 (CLRB no. 822), to afford the applicant the opportunity to remedy the deficient provisions. This largely non-interventionist policy of the Board is described as one which, in the opinion of the applicant, would be reinforced by the Federal Court of Appeal judgment in the Canadian Association of Trades case, supra).

It follows that any change to the Council's present constitution - as inevitable as change is in these cases - is a matter for the members to consider and decide. And, should the Board determine that the Council is not properly constituted, it should decide as a preliminary matter to give the Council an opportunity to comply with the directions of the Board and to amend its constitution accordingly before dealing with the selection of bargaining agents.

The Law

Section 32 sets out the process and the general requirements governing the certification of a council of trade unions. It reads as follows:

"32.(1) Where two or more trade unions have formed a council of trade unions, the council so formed may apply to the Board for certification as the bargaining agent for a unit in the same manner as a trade union.

(2) The Board may certify a council of trade unions as the bargaining agent for a bargaining unit where the Board is satisfied that the requirements for certification prescribed by or pursuant to this Part have been met.

(3) Membership in any trade union that forms part of a council of trade unions is deemed to be membership in the council of trade unions.

(4) Where a council of trade unions is certified by the Board as the bargaining agent for a bargaining unit,

(a) the council of trade unions and each trade union forming the council of trade unions is bound by any collective agreement entered into by the council of trade unions and the employer concerned; and

(b) this Part applies, except as otherwise provided, as if the council of trade unions were a trade union."

(emphasis added)

This means first that, in order to be certified, a council of trade unions must satisfy at least the requirements applicable to individual trade unions, namely those contained in section 28, part of which relate to the definition of a trade union found in sections 3 and 28 of the Code. There are two obvious requirements for certification: an applicant must apply and it must be a "trade union." These are referred to as the trade union status requirements. In turn, section 16 provides:

"16. The Board has, in relation to any proceeding before it, power

...

(e) to examine documents forming or relating to the constitution or articles of association of

- (i) a trade union or council of trade unions that is seeking certification, or
- (ii) any trade union forming part of a council of trade unions that is seeking certification; ..."

In past decisions, the Board has dealt extensively with the issue of trade union status. See Canadian Imperial Bank of Commerce (Victory Square Branch) (1977), 20 di 319; [1977] 2 Can LRBR 99; and 77 CLLC 16,089 (CLRB no. 90); Bank of Nova Scotia (Port Dover Branch) (1977), 21 di 439; [1977] 2 Can LRBR 126; and 77 CLLC 16,090 (CLRB no. 91); Reimer Express Lines Ltd., et al. (1979), 38 di 213; and [1981] 1 Can LRBR 336 (CLRB no. 226); Keith Sheedy (1980), 39 di 36; [1980] 1 Can LRBR 391; and 80 CLLC 16,029 (CLRB no. 230); Air West Airlines Ltd. (Air West Operations Ltd.) (1980), 39 di 56; and [1980] 2 Can LRBR 197 (CLRB no. 231); and Capital Coach Lines Ltd. (Travelways) (1980), 40 di 5; [1980] 2 Can LRBR 407; and 80 CLLC 16,011 (CLRB no. 233). Therefore, there is no need to elaborate on this aspect of the matter except to say that the trade union status embodies at least three essential elements.

- (1) It must be an organization.
- (2) The organization must consist of employees.
- (3) The organization must exist and have a constitution including, as one of its objectives, the regulation of relations between employers and employees.

One way for the Board to determine whether a union meets those prerequisites is by examining the way in which the organization was established. How did it define and adopt the rules by which it is governed? What is its

internal machinery? In short, the Board must look at the organization's constitution, by-laws and other relevant documents. We do so as a matter of standard practice when dealing with first-time applicants for certification.

One fundamental aspect of section 32 as opposed to section 28 relates to the discretion conferred to the Board with regard to the certification of councils of trade unions. Unlike section 28 which states that "the Board shall ... certify the trade union making the application", section 32(2) uses the form "may certify. ..." Hence where a union has a strict right to be certified, a council does not (see Curragh Resources and Altus Construction Services Ltd. (1987), 70 di 186; 18 CLRBR (NS) 233; and 87 CLLC 16,034 (CLRB no. 640); and House of Commons, Senate, Library of Parliament, Members of the NDP Caucus (1985), 62 di 225; 11 CLRBR (NS) 43; and 85 CLLC 16,065 (CLRB no. 536)).

The exercise of this discretion is of particular importance given the clear meaning of section 16 (p)(iv):

"16. The Board has, in relation to any proceeding before it, power

...

(p) to decide for all purposes of this Part any question that may arise in the proceeding, including, without restricting the generality of the foregoing, any question as to whether

...

(iv) an organization or association is an employers' organization, a trade union or a council of trade unions,..."

This provision is of special significance in the case of a council of trade unions, as the Code contains no statutory definition of a council of trade unions.

In MacCosham Van Lines Ltd. (1984), 56 di 192; 7 CLRBR (NS) 216; and 84 CLLC 16,051 (CLRB no. 474), the Board addressed the differences between a trade union and a council of trade unions and how their definitional treatment varied across jurisdictions. The specific question of whether a council could be deemed a trade union within the meaning of the Code was posed and answered in the negative:

"Can a council of trade unions be a trade union within the meaning of the Code considering that they are normally organizations of trade unions rather than of employees? Can the words, 'any organization of employees, or any branch of local thereof', used in the definition of trade union be interpreted to include a council of trade unions? We are of the opinion that those words cannot be so construed. The omission of a council of trade unions from the general definition of a trade union in section [3] can only be taken as deliberate in light of section [88] of the Code that specifically includes a council of trade unions within the meaning of 'trade union' for the purposes of the 'Prohibitions and Enforcement' contained in Division VI of Part V. "

The answer lies in section [32] of the Code:

...

Through section [32], the legislators have provided a means by which trade unions can band together, on a voluntary basis, to become a single bargaining agent. For those purposes, section [32] and particularly paragraph 4(b) grants trade union status to a council of trade unions in an indirect way and then only after it has been certified.
..."

(pages 197; 220-221; 14,419-14,420)

A look at the Board's case law established in recent years suggests indeed an empirical or case-by-case approach to certification matters involving councils of trade unions. Section 32 is broadly defined so as to address all sorts of situations. This explains at least in part what amounts to a prudent, labour relations-

oriented approach on the part of the Board in its administration of section 32. Radically different scenarios crop up in the everchanging field of labour relations. When one looks at the Board's constituency, one finds in some corners very small-sized employers with 15 or so employees (the average size of units certified by the Board in 1990-91 was 78 employees). In others, as is the case here, there are thousands of employees spread out all over the country. In one case, it is easy to imagine two unions dealing with different employers joining forces to share resources, and seeking as a council two certifications, one for each of the employers they deal with. In the instant one, there are as many as four unions linked to a common employer; they are considering sharing the role of bargaining agent within a single bargaining unit.

In addition, there is a clear difference of emphasis on the role of the Board depending on the factual situation that brings about the application by a council. In some cases, the application relates to a realignment of the bargaining units as is the case here. In others, we have union successorship issues or straightforward raid situations. For instance, the hands-on approach used by the Board in CN/CP Canadian National Railway Company et al. (1986), 64 di 70 (CLRB no. 556), in its examination of structural or constitutional matters is markedly different from the one used in cases where no restructuring of units is involved. Of the latter variety are Canadian Pacific Express and Transport (1988), 73 di 83 (CLRB no 682), or Bank of Nova Scotia, supra, where a raid by the Council of Teamsters and a status challenged by the employer were respectively the two situations involved.

Unions' internal constitutional matters are among the factors the Board will look at when dealing with a council's application. The following excerpts from the decision in CN/CP Canadian National Railway Company et al., supra, are a good indication of how this kind of concern was indeed found relevant in determining whether the certification of a council remained appropriate.

"The very essence of the case of the three main applicants requesting to be granted separate bargaining rights is that the Council did not work. How it did not work was the subject of long testimonial evidence and many exhibits by the Carmen, the IAM and the IBEW. Democratic representation principles were at stake and had to be reconciled by the Council in an attempt to govern unequal partners. The very small unions, in exchange for their accepting to be subsumed into the Council, expected to have or to preserve as close to an equal voice as that of, for instance, the Carmen who represented approximately 50% of the employees covered. The old maxim 'no taxation without representation' also got into the act. The Carmen were expected to pay the same per capita as the others in the Council, notwithstanding their disproportionate voice in the decision-making process of the Council.

To a lesser degree, but in the same fashion, the IAM with over 5,000 employees covered and the IBEW with over 3,000 were confronted by the same dilemma.

The evidence is that for years now the three unions all had a hand at attempting to amend the Council's constitution in search of a formula which would keep all component unions satisfied, but without success: the aspirations of each of the unions and the dimensions of the problems were irreconcilable. The end result? The Council became a straitjacket because of its very legal nature. The Code provides that the certified Council is the only permitted voice to speak on behalf of its components. Therefore, matters had to be put to a vote where the Council had to speak for its members and when a matter was put to a vote, all the formulae used enhanced the power of the smaller unions who voted a disproportionately large number of votes. The end result was that in all cases each of the 'big three's' position could always be outvoted by the smaller unions; in the case of the Carmen, it because particularly galling.

...

The evidence indicates that, at the time of hearings, the whole permanent staff of the

Council was reduced to two persons. The quid pro quo was for the Council to hand back to the unions a great proportion of the responsibilities which a bargaining agent usually handles: for instance, grievances and arbitrations except for a token registration by the Council in the latter case. This practice, in turn, place the Council, the employees in the unit, and the craft unions in jeopardy as to who was responsible for what, as illustrated by a number of situations witnessed by the Board in applications for violations of the duty of fair representation [37] of the Code)."

(pages 83-84)

The fact that the Board received in that case a decertification application does not mute the main message vis-à-vis the Board's role in this application. Specifically, the evidence found relevant was, by implication, what the Board considered then to be a requirement for certification, since according to section 41, the Board may revoke the certification of a council when that organization "no longer meets the requirements for certification of a council of trade unions." In that particular case the Board chose to exercise its discretion in accordance with its role of enhancing industrial peace in line with the objectives set out in the preamble of the Code. The decision in Maritime Atlantic, supra, speaks to the same broad exercise of discretion.

VI

Analysis

Applications for the certification of councils of trade unions remain relatively infrequent in the federal jurisdiction. In recent years, they have originated essentially from the transportation industry often involving craft unions (e.g. CN/CP Canadian Railway Company et al., supra). For the Board, these

applications, particularly when linked to a unit restructuring process as we have just seen, tend to result in a more involved role as the number of issues increase in scope and complexity. Such is the case here.

Counsel for NABET and the applicant identified the issues raised by the present applications under the following headings in his submissions of November 1, 1991.

- (a) Is the applicant a council of trade unions within the meaning of the Code?
- (b) Should its application for certification be granted or, to put it more precisely given the preliminary nature of this decision, should it be entertained on its merits?

Status of the Council

A key question asked of the Board under this heading is really that of determining whether the set of statutory requisites to be met by a council of trade unions for certification is equal to, different from, or greater than those applicable to individual unions? Tied to this question is also the extent of the Board's authority to look into and examine in some detail a council's constitution and by-laws.

First, in a formal sense, the Council appears to meet all of the three minimal requirements contemplated under sections 32 and 3 to be granted trade union status for the purposes of section 32. Except for the fact that its status is here vigorously challenged, the Council's situation would not be, in appearance, that dissimilar

from the one in Canadian Pacific Express and Transport, supra. The Council is indeed constituted of trade unions whose union status is not in dispute. Second, it has given itself a constitution, one purpose of which relates to the regulation of labour relations. Third, it has been empowered by its member unions to act on their behalf. Or has it?

Questions have been raised by ACTRA and CUPE notably on the constitutional authority and procedural appropriateness of the mandate given to the Council by the member unions. The Board, given its other findings, need not enter that debate although it made no secret of some of its concerns. Since many of these concerns have to do with what can broadly be defined as internal union matters and that not a single employee presumably affected has in fact expressed any concern, the Board chooses not to dwell any longer on the issue. In that sense, these matters will be left for the unions involved to sort out or remedy. But assuming that the Council meets all formal requirements to be granted status, this still leaves the Board with the question of whether the organization as constituted should be certified under section 32.

Should the Council be certified?

If this application did not fall under section 32, there would be no need to answer this question. In reality the question turns squarely on the discretion given to the Board to certify a council. How this discretion is to be exercised, over which matters and according to what principles are questions to which we now turn.

Let us first situate these questions within the broad

framework of certification under the Code. There are three basic ingredients in any certification: a union, an appropriate bargaining unit, and majority union support among the employees. In Decision No. 846, on the configuration of bargaining units, the Board examined in detail the reasons why the proliferation of bargaining units was no longer appropriate. It did so for obvious practical reasons directly linked to the need to develop and promote sound labour relations in a context radically different from what it was. Central in these reasons was the blurring of traditional distinctions between trades involved in programming or on-air activities brought about by the ever-quickening pace of technology. The Board unequivocally found a need to increase the career mobility of the CBC employees affected by obsolete and artificial barriers between bargaining units that had often been erected around work jurisdiction. This need is still, in the eyes of the Board, of paramount importance. We cannot in the circumstances of this case deny its decisive influence in the determination of the matter before us. Thus, a more appropriate way to put the question before us is the following: is the certification of the Council as presently constituted likely to bring us closer to this state of affairs?

Many of the applicants' and respondents' submissions are purely formalistic. On the one hand, the Council says, restrict your inquiry to the fact that we have satisfied the routine administrative requirements. We have filed an application, we have a constitution, member unions are grown-ups and have passed valid resolutions to join the council. That, they argue, is the test. This is to the member unions' satisfaction and should be to the Board's as well, since it appears to meet the requirements of section 28. On the other hand, the opponents take a very

close look at the constitutions and resolutions of the applicant's member unions and point to fatal flaws. Granted, other arguments were raised, but much ado was made about the rules and procedures one is expected to go through in such proceedings. We do not consider proper to address the issue of the Board's discretion under section 32 on the basis of formalistic requirements. Substance is our concern and it seems to us that it is with practical labour relations in mind that Parliament has granted the Board under section 32, the discretion that was denied under section 28.

The Board certainly agrees with the statement made by counsel for NABET in his March 16, 1992 letter to the Board regarding the Canadian Association of Trades case, supra, to the effect that:

".... the Board should not engage in the minute examination of the constitution of an employee organization and should not assume the responsibility of overseeing the activities of trade unions in relation to their internal constitutions."

This surely cannot mean, however, that the Board ought not to look at the constitutional arrangements and their likely significance and impact vis-à-vis some of the broad industrial relations objectives underlying the Board's finding with respect to appropriateness and the realignment of the bargaining structure at the CBC.

Indeed, it is with that in mind that the Board looked at the constitution of the Council asking itself whether these arrangements are likely to give effect to the strong community of interest of employees identified by the Board in all units, and particularly Unit no. 1, which was a favourite battleground for work jurisdiction

disputes. What it found is a constitutional edifice whose corner-stone is unmistakably the preservation of existing lines of job jurisdiction. This dominant trait manifests itself in a number of ways.

- (a) The preamble and Article 2 state clearly their goal to retain the integrity and identity of the Council's constituent members and to protect the jurisdiction of each member union.
- (b) Article 4 defines the jurisdiction of the founding unions as that "set out in the [current] collective agreements between the founding unions and the Canadian Broadcasting Corporation."
- (c) The Council grants veto power to each of the founding unions in matters of critical labour relations interest such as strike votes, ratifications, agreements and the processing of classification grievances through to arbitration.
- (d) The internal machinery contemplated under Article 15 to deal with classification disputes among unions rests with the executive board and requires unanimous votes. Failing that, matters are referred to an arbitrator.

The Board appreciates of course that the Council's constitution features other provisions relating to the stated objectives of eliminating jurisdictional disputes and strengthening its bargaining position vis-à-vis the employer. Yet, if in the past these causes for disputes

were spread over and among bargaining units and unions, they would be under the new set-up centralized, in fact and on constitutional paper, and officially recognized as sound and worthwhile. With respect, the fact is that these reassuring provisions fail to translate into an authority structure, a decision-making process or a set of rules that would likely give them real effect. It may be that in some different bargaining environment these arrangements would not prove to be of as much consequence. Not so at the CBC where in the word of a counsel "there is no difference between a union and the bargaining unit." The last nine years of proceedings before this Board have done little to suggest otherwise.

More specifically, the constitutional rules governing the working of the Council as presently defined fail to address some of the basic issues the restructuring of the bargaining units at the CBC as decided by this Board was meant to resolve. They include the following:

- (a) the multiplication of the number of actual if not official bargaining agents for employees performing similar functions;
- (b) the likely need of numerous collective arrangements if not agreements to regulate similar working conditions and interests just to satisfy the safeguard of obsolete jurisdictions;
- (c) the proliferation of work jurisdiction disputes as a result of factors just referred to;

(d) the need for constant shifting of union allegiance, as well as double or triple allegiance depending on the particular area of work to which an employee happens to be assigned.

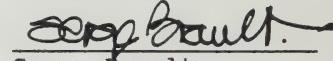
Now, the Board would need to take a very Panglossian view of the world of labour relations and union politics at the CBC to conclude that the Council's constitutional rules would go some way toward eliminating these obstacles to employees' career mobility.

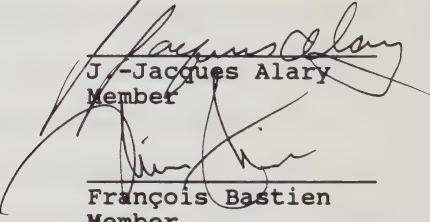
A number of questions were also raised regarding the viability of the Council as a bargaining agent in view of the veto power given to all founding unions vis-à-vis some critical labour relations functions. The Board need not comment at this juncture other than to suggest that some of the reported deficiencies are more effect than cause, the cause being in this instance the overriding preoccupation of the founding unions to preserve the jurisdictional status quo. Again, the important consideration for the Board is how to maintain the integrity, as well as the operation, of the newly defined units as opposed to that of the existing bargaining agents however able they may be.

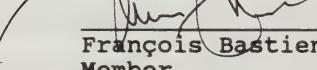
Based on all these reasons, the Board decides that the Canadian Council of Broadcast Unions as presently constituted should not be certified and, as a consequence, not be entitled to take part in Phase III of these proceedings. Counsel for CUPE has asked that this application be dismissed outright, should the Board find it deficient in a number of respects. The Board concludes that for labour relations purposes, such a course of action is not appropriate. Instead, the

Council and its constituent unions will be given the opportunity to review and rethink their proposed constitutional arrangements in the context of this decision. The Council has until May 22, 1992 to advise the Board of any fact, situation or development likely to necessitate the Board's reconsideration of the present application, failing which it will be dismissed.

This is a unanimous decision of the Board.


Serge Brault
Vice-Chair


J.-Jacques Alary
Member


François Bastien
Member

ISSUED at Ottawa, this 21st day of April 1992

CLRB/CCRT - 926

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RÉSUMÉ

CHEMIN DE FER QUEBEC NORTH SHORE & LABRADOR, REQUÉRANTE, AINSI QUE MÉTALLURGIESTS UNIS D'AMÉRIQUE (SECTIONS LOCALES 5569, 8398, 8398-02, 8399 ET 8399-01) ET TRAVAILLEURS UNIS DES TRANSPORTS, SECTION LOCALE 1843, INTIMÉS.

Dossiers du Conseil : 530-2019

Décision n° : 927

Dans cette affaire, le Conseil rejette une objection préliminaire en trois volets semblable à celle présentée dans la décision Compagnie des chemins de fer nationaux du Canada (1991), décision du CCRT n° 845, non encore rapportée, laquelle a également été rejetée.

Le Conseil rejette ensuite une objection préliminaire fondée sur la Charte canadienne des droits et libertés pour les mêmes motifs que ceux exposés dans Canadien Pacifique Limitée (1991), décision du CCRT n° 866, non encore rapportée.

Il est enfin question de la compétence du Conseil pour réviser des unités de négociation reconnues volontairement par l'employeur. Se reportant à la décision Groupe Canada Transport Ltée. (1989), 78 di 174; 5 CLRB (2d) 119; et 89 CLLC 16,044 (CCRT n° 759), le Conseil conclut qu'il peut, de façon incidente à l'élargissement de la portée d'unités accréditées, influer sur la portée d'unités de négociation reconnues volontairement.

SUMMARY

QUEBEC NORTH SHORE & LABRADOR RAILWAY CO., APPLICANT, AND UNITED STEELWORKERS OF AMERICA (LOCALS 5569, 8398, 8398-02, 8399 AND 8399-01) AND UNITED TRANSPORTATION UNION, LOCAL 1843, RESPONDENTS.

Board File: 530-2019

Decision No.: 927

In this case, the Board dismissed a preliminary objection in three parts similar to that filed in Canadian National Railway Company (1991), as yet unreported CLRB decision no. 845, which was also dismissed.

The Board then dismissed a preliminary objection based on the Canadian Charter of Rights and Freedoms on the same grounds as those outlined in Canadian Pacific Limited (1991), as yet unreported CLRB decision no. 866.

Finally, the case dealt with the Board's authority to review bargaining units that the employer recognized voluntarily. Referring to Canada Transport Group Ltd. (1989), 78 di 174; 5 CLRB (2d) 119; and 89 CLLC 16,044 (CLRB no. 759), the Board concluded that, in the course of expanding the scope of certified units, the Board could incidentally affect voluntarily recognized units.



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REASONS FOR DECISION

Quebec North Shore &
Labrador Railway Co.,

applicant,

and

United Steelworkers of
America, Locals 5569,
8398, 8398-02, 8399 and
8399-01, and United
Transportation Union,
Local 1843,

respondents.

Board File: 530-2019

The Board was composed of Mr. J.F.W. Weatherill, Chairman,
and Mrs. Ginette Gosselin and Mr. Robert Cadieux, Members.

Heard at Quebec City, March 24, 1992.

Appearances

Mr. Robert Monette, Ms. Véronique Marleau and Mr. Jean-Marc
Blake, for the applicant;

Mr. Gilles Grenier and Mr. Jean-Claude Degrasse, for the
United Steelworkers of America, respondent; and

Mr. Frank J. Luce and Mr. Berthier Arsenault, for the United
Transportation Union, respondent.

These reasons for decision were written by J.F.W.
Weatherill, Chairman.

This decision deals with certain preliminary objections
raised by the respondents. At the joint request of the
applicant and the United Steelworkers of America,
consideration of an objection to constitutional
jurisdiction, contesting the application of the Code to the

activities and personnel of Local 5569 of the union, was postponed, the parties having reserved the right to present evidence and arguments should the case eventually be heard on its merits.

The first objection, raised by the two respondents, incorporates somewhat the principal objections raised in files 530-1850 and 530-1851 (Canadian National Railway Company (1991), as yet unreported CLRB decision no. 845), and the respondents more or less adopted the arguments presented in the latter case. In the above-cited case, the Board heard three preliminary objections. The first questioned the relevance of the employer's applications, given that these applications concerned freedom of association. In dismissing this objection, the Board recognized that an employer has a legitimate interest in the determination of units appropriate for collective bargaining, and that there was no question of denying the employees their right to representation. The present panel shares this view and we make the same finding in the instant case.

The second objection questioned the admissibility of the application, given the relatively short period of time that has passed since the Board rendered a decision involving the same parties and dealing likewise with the determination of units appropriate for collective bargaining. In the instant case, the parties are not the same, nor are the events that gave rise to the disputes between the parties. We do not therefore consider the present application premature.

The third objection questioned the substance of the allegations. In the present case, we are of the opinion that the allegations, when viewed in the context of the documents

filed in support of the application, have substance and that the respondents should be able to reply adequately to the application.

Another preliminary objection raised in the instant case is based on the Canadian Charter of Rights and Freedoms. The objection is essentially the same as that raised in Canadian Pacific Limited (1991), as yet unreported CLRB decision no. 866, and we have reached the same conclusion here as the Board reached in that case.

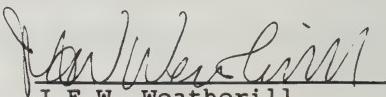
A final preliminary objection contests the Board's jurisdiction to review bargaining units voluntarily recognized by the employer. In fact, of the nine units at issue here, three were not certified by the Board. It is therefore alleged that there is no order or certificate that is reviewable by way of a section 18 application. A similar question was decided in Canada Transport Group Ltd. (1989), 78 di 174; 5 CLRBR (2d) 119; and 89 CLLC 16,044 (CLRB no. 759), in which the Board said the following:

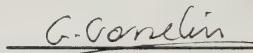
"Upon reflection, and without having to decide the matter, we believe that section 18 allows the Board to affect the scope of voluntarily recognized units only in an incidental fashion while extending the scope of certified units."

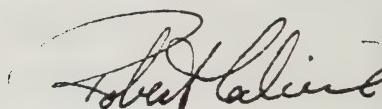
(pages 192; 135; and 14,431; emphasis added)

In the present case, the units recognized voluntarily would be affected in an incidental fashion by a possible review further to the application before us. This objection too is dismissed.

Without deciding the objection to constitutional jurisdiction mentioned at the outset, we conclude that we have jurisdiction to hear the application on its merits. For all these reasons, the objections discussed herein are dismissed.


J.F.W. Weatherill
Chairman


Ginette Gosselin
Member


Robert Cadieux
Member

ISSUED at Ottawa, this 22nd day of April 1992.

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SUMMARY

CANADIAN MUSEUM OF CIVILIZATION, APPLICANT, AND PUBLIC SERVICE ALLIANCE OF CANADA, PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND ASSOCIATION OF PUBLIC SERVICE FINANCIAL ADMINISTRATORS, RESPONDENTS.

Board File: 590-7

Decision No.: 928

The Canadian Museum of Civilization filed an application under sections 47(3) of the Code and 41(3) of the Museums Act, S.C., 1990, c. 3. This application followed the coming into force of said Act on July 1, 1990, which established as separate corporations certain museums which had formerly been grouped together in a single corporation under the National Museums Act. Before that date, labour relations in those museums were governed by the Public Service Staff Relations Act. The new corporations are agent corporations of the Crown and have become the employers, within the meaning of the Code, of the museum employees.

The employer requested that the Board determine that a single bargaining unit comprised of all employees of the museum is from now on appropriate.

After considering the evidence and the arguments, the Board decided that two bargaining units were appropriate: one general unit comprised of all employees, excluding scientific researchers, and the other unit comprised of scientific researchers.

The Board reiterated that the principles recognized in determining bargaining units should be used as guidelines, taking into consideration the facts of the case, and particularly that the Board need not determine the most appropriate bargaining unit. In this case, the Board looked at the nature of the duties and the work methods of the various categories of employees, including the degree of interaction and interdependence between the scientific researchers and the other employees of the museum.

MUSÉE CANADIEN DES CIVILISATIONS, REQUÉRANT, ET ALLIANCE DE LA FONCTION PUBLIQUE DU CANADA, INSTITUT PROFESSIONNEL DE LA FONCTION PUBLIQUE DU CANADA, FRATERNITÉ INTERNATIONALE DES OUVRIERS EN ÉLECTRICITÉ ET ASSOCIATION DES GESTIONNAIRES FINANCIERS DE LA FONCTION PUBLIQUE, INTIMÉS.

Dossier du Conseil: 590-7

Décision n°: 928

Le Musée canadien des civilisations a présenté une demande en vertu des paragraphes 47(3) du Code et 41(3) de la Loi sur les musées (S.C. 1990, c.3). Cette demande fait suite à l'entrée en vigueur le 1^{er} juillet 1990 de cette loi qui a constitué en sociétés distinctes certains musées auparavant regroupés en une seule société en vertu de la Loi sur les musées nationaux. Avant cette date, les relations du travail de ces musées étaient régies par la Loi sur les relations de travail dans la fonction publique du Canada. Ces nouvelles sociétés sont des personnes morales mandataires de l'État et sont devenues les employeurs, au sens du Code, des employés des musées.

L'employeur a demandé au Conseil de déterminer qu'une seule unité de négociation regroupant tous les employés du musée était dorénavant appropriée.

Après examen de la preuve et des arguments, le Conseil a décidé que deux unités de négociation étaient appropriées: une unité générale regroupant tous les employés à l'exclusion des chercheurs scientifiques et une unité regroupant les chercheurs scientifiques.

Le Conseil a rappelé que les principes généralement reconnus en matière de détermination des unités de négociation sont des lignes directrices qui doivent être appliquées en tenant compte des faits de l'espèce, en particulier que le Conseil n'a pas à rechercher l'unité de négociation la plus appropriée. Dans le cas présent, le Conseil s'est particulièrement attardé à la nature des fonctions et aux modes d'exécution du travail des différentes catégories d'emploi, notamment la proportion d'interrelation et d'interdépendance entre les chercheurs scientifiques et les autres employés du musée.



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Reasons for Decision

Canadian Museum of
Civilization,

applicant,

and Public Service Alliance of
Canada, Professional Institute
of the Public Service of
Canada, International
Brotherhood of Electrical
Workers, and Association of
Public Service Financial
Administrators,

respondents.

Board File: 590-7

The Board was composed of Ms Louise Doyon, Vice-Chair, and
Messrs J.-Jacques Alary and François Bastien, Members.

Appearances:

Mr. Guy P. Dancosse, accompanied by Mr. Guy Baril, law
student, for the applicant;

Mr. Peter J. Barnacle, assisted by Mr. Luc Grenier,
negotiator for the Professional Institute of the Public
Service of Canada; and

Mr. Andrew Raven, assisted by Ms Penny Bertrand, organizer
for the Public Service Alliance of Canada.

The reasons for decision were written by Ms Louise Doyon,
Vice-Chair.

I

Procedure:

On July 20, 1990, the Board received from the Canadian
Museum of Civilization (the employer or the Museum) an
application under sections 47(3) of the Code and 41(3) of
the Museums Act. That application followed the coming

into force, on July 1, 1990, of the Museums Act, which established as separate corporations certain museums which had formerly been grouped together in a single corporation under the National Museums Act. At that time, staff relations in those museums were governed by the Public Service Staff Relations Act. The museums in question were the National Gallery of Canada (which includes the Canadian Museum of Contemporary Photography), the Canadian Museum of Civilization (which includes the Canadian War Museum and the Postal Museum), the Canadian Museum of Nature and the National Museum of Science and Technology (which includes the National Aviation Museum). These new corporations are agent corporations of the Crown and have become the employers, within the meaning of the Canada Labour Code, of the museum employees. Along with this application were three others of a similar nature pertaining to the other museums mentioned above. In the case of the National Museum of Science and Technology's application, the Board has issued an interim certification order on July 31, 1991.

Subsection 47(3) of the Code provides that if a sector of the federal government governed by the Public Service Staff Relations Act becomes subject to the Code, the new employer may ask the Board to determine whether one or more bargaining units are appropriate and, depending on that finding, to decide whether one or more unions are to act as bargaining agent. In the instant case, the Board must decide, at the request of the new employer, whether the latter's employees must henceforth form a single bargaining unit, as both the employer and the Public Service Alliance of Canada (the Alliance) contend, or two bargaining units, as maintained by the Professional Institute of the Public Service (the Institute). The said

employees are currently distributed among 21 bargaining units established by the Public Service Staff Relations Board and are governed by 23 collective agreements, including two framework agreements -- that of the Alliance and that of the Institute. At the beginning of the hearings in July 1991, the Museum had approximately 555 employees, 440 of whom were represented by four bargaining agents. The Alliance represented 380 employees, distributed among 14 bargaining units and 18 classifications. They consist of support and secretarial staff as well as administrative and technical personnel. The Institute represented 48 employees distributed among 5 bargaining units and 5 classifications. These employees are scientific researchers (classified HR and SE-RES), architects, engineers and computer systems management personnel. For their part, the International Brotherhood of Electrical Workers and the Association of Public Service Financial Administrators represented eight and ten employees respectively with each group included in a separate bargaining unit.

The employer's application also takes issue with the employee status within the meaning of the Code of certain incumbents of positions, and asks the Board to rule on this matter.

On April 4, 1991, the International Brotherhood of Electrical Workers notified the Board that it was withdrawing from the case. The Association of Public Service Financial Administrators indicated that it would take no position on the description of the bargaining units but was reserving the right to make submissions on the list of employees entitled to union representation.

The Board heard the parties in a public hearing on the question of determining the appropriate bargaining unit. The requests regarding the employee status of certain incumbents of positions will be examined once this matter has been settled.

The hearings took place in Ottawa on July 3, 4, 5, 10, 11 and 12, September 4, 5 and 6, October 15, 16, 17 and 18 and November 26, 1991, as well as January 23 and 27, 1992. On February 4, the Institute's representative asked the Board to reopen the investigation following an administrative reorganization affecting in particular the Collections and Research Division, which includes the scientific researchers. The Board suspended its deliberations and, after receiving the written submissions of the parties on this matter, decided not to hear the parties again in a public hearing. Deliberations on the case resumed on March 20, 1992.

Position of the Parties

According to the employer, the statutory purpose conferred on the Museum cannot be carried out without the administrative and functional integration of all the activities of the organization. This objective cannot be efficiently attained if the administration of human resources and staff relations involves more than one bargaining unit. The employer's position is based on the current situation, in which personnel management is made more difficult by the number of collective agreements in place. The employer also argues that the duties of all categories of employees of the Museum are interdependent and interrelated, particularly in a teamwork context, and

that this shows a community of interest which justifies establishing a single bargaining unit. The Board should not take into account the history of certifications and collective negotiations that have shaped the set-up and the conduct of labour relations in the federal Public Service, for the new employer's status differs from that of the previous employer. In short, the employer argues that the establishment of the Museum as an autonomous corporation, combined with its obligation to take the necessary steps to achieve the objectives of its founding Act support the notion of a single bargaining unit.

The Alliance adopts a position similar to the employer's. Proper collective representation of the employees would be achieved by having a single bargaining unit. The differences that currently exist in the conditions of employment of employees represented by the bargaining agents are minor, and in any case, a single bargaining unit would not prevent the scientific researchers and other employees sought by the Institute from making their needs known through a single collective bargaining process. Furthermore, the fact that the scientific researchers hold master's and doctoral degrees in disciplines in the humanities such as anthropology, archeology, linguistics or history is not a decisive factor. Other Museum employees, currently represented by the Alliance, also have university degrees or have completed scientific and technical studies in fields that are just as specialized. In view of the operational structure, the procedures for the performance of duties and the conditions of employment as they now exist, the Board should recognize the principle of a single bargaining unit as developed in case law. The scientific researchers' interests and those of other Museum employees

are not sufficiently divergent or different for the Board to depart from that principle.

The Institute argues that two bargaining units are appropriate, with one unit to represent scientific researchers, librarians, engineers and architects, and a second to represent the other employees. The Institute does not claim the computer systems management personnel whom it already represents. The very nature of the duties of these four groups of employees dictates the ways their work is to be performed, and is sufficiently specific to justify the existence of a separate bargaining unit. An additional factor is the general requirement for a scientific researcher to hold a master's or doctoral degree. The community-of-interest criterion as applied here points in the direction of a separate unit. Administrative and operational integration, particularly in the form of teamwork, is a relative matter and is a factor only at certain stages of the work, whereas most of the components of the work are performed autonomously and independently. There is some interaction and interrelationship of duties, but not in a way that prevents the establishment of a separate bargaining unit for the employee groups sought by the Institute. According to the Institute, the need for the effective management of the organization and its staff relations function will not be compromised by the existence of two bargaining units and the possible presence of two bargaining agents, while the interests of the employees covered will be better protected. The Institute is not seeking to split up an existing bargaining unit, but rather to support a reality that already exists with regard to the protection and promotion of the specific interests of the employees concerned. The Institute also

seeks a finding that the position of curator of collections at the Postal Museum, occupied by Ms O'Reilly McLeod and currently classified IS, is one that should be included in the unit sought by the Institute.

II

The facts:

The main establishment of the Canadian Museum of Civilization located on Laurier Street in Hull opened its doors in June 1989. Some services of the Museum are temporarily located in other premises, but all activities should shortly be brought together in the main building. The Canadian War Museum, which is an affiliate of the Museum of Civilization, is responsible for its own collections and its activities and research program, but its administrative services come from the Museum of Civilization. The Postal Museum is an integral part of the Museum of Civilization and comes under the Exhibitions and Program division.

Section 8 of the Act describes the Museum's purpose as follows:

"The purpose of the Canadian Museum of Civilization is to increase, throughout Canada and internationally, interest in, knowledge and critical understanding of and appreciation and respect for human cultural achievements and human behavior by establishing, maintaining and developing for research and posterity a collection of objects of historical or cultural interest, with special but not exclusive reference to Canada, and by demonstrating those achievements and behaviour, the knowledge derived from them and the understanding they represent."

To ensure that its objectives are achieved, the Museum has set up an administrative and operational structure that

includes the following branches: Collections, Research, Exhibitions and Program, Public Affairs, Finance and Museum Services, Commercial Program and Human Resources. Prior to February 10, 1992, the Collections and Research branches were one administrative unit under the responsibility of Dr. Paul Carpentier. On that date, that unit was split into two separate branches, Research and Collections. Mr. S. Anglis became acting director of the Research branch, while Dr. Carpentier became director of the Collections branch. The Collections Management division, the Conservation division and the Library have as of that date been made part of the Collections branch. Certain positions in the area of archival collections, sound tracks, film archives, design and technical services, which were formerly under the Research and Collections division, have also been transferred to the Collections division. The Research branch is thus basically responsible for the scientific and historical research carried out by scientific researchers in the following divisions: Archeological Survey of Canada, Canadian Ethnology Service, Canadian Centre for Folk Culture Studies, and the History division. It was following these changes that the Institute requested that the investigation be reopened. It alleges, among other things, that the unit that it seeks, which now constitutes a separate administrative component, has the effect of contradicting the position adopted by the employer in response to the Institute's request. The employer and the Alliance, for their part, argue that these changes are minor and do not affect the nature of the duties or the operational reality as already established by the evidence.

Three branches, namely Collections, Research, and Exhibitions and Program, are the administrative units responsible for fulfilling the Museum's main objectives, which are to establish, maintain and develop a collection of objects for research and to demonstrate these achievements and disseminate them to the general public. The evidence basically concerned the nature of duties, the organization of the work and the relations that exist between the different categories of employees.

The Board heard lengthy evidence from the parties. That evidence contains no major contradictions, although it presents differences of opinion and strong shadings in the interpretation of certain facts.

For purposes of ruling on the matter submitted to the Board, these facts may be basically summarized as follows:

1. The Museum of Civilization in the 1990s

The purpose of the Museum and the means of fulfilling that purpose, while formulated in new statutory terms since July 1, 1990, are neither different from nor foreign to the reality of the Museum prior to that date. The establishment of the Museum as an autonomous corporation and the opening of new premises nevertheless entailed new challenges that led to adjustments for Museum management and the employees. However, this new reality did not fundamentally call into question either the structure of the Museum or the different tasks and duties of the employees.

It is an established fact that over the coming years, the Museum intends to fully exercise the areas of jurisdiction that the Act attributes to it. The new

building offers the necessary opportunities for processing and developing the Museum's collections and presenting them to the general public. For this purpose, the Museum wants the management of activities and human resources to be facilitated by a single-level bargaining structure.

2. The Objectives of the Museum of Civilization

2.1 Research

The Museum owns collections of objects and documents of historical and cultural interest. These collections have been established and developed by means of research activities since 1842, the year the Canada Geological Survey was founded. At present, the objective of scientific researchers's work is to continue to develop these collections and establish new ones. Thus museum research has always pursued similar objectives, although the methods of performing the work have changed and evolved from one period to another.

The purpose of research, be it basic, theoretical or applied, is to generate knowledge, and it is carried out with a view to disseminating the knowledge thus acquired, by any appropriate means of communication. In this sense, research work is preliminary to the mission of dissemination and presentation. Research work may be spread over several years, it being understood that it is normally carried out concurrently with other research and dissemination activities. Research findings are often unexpected or accidental in relation to the hypothesis formulated in the initial design of the

research project. In such a case, the use of the knowledge and results obtained is to be determined in accordance with work projects either existing or to be developed, as the case may be.

The pattern for carrying out research at the Museum is as follows. In chronological terms, the first stage is the development of collections. This includes finding and documenting objects, artifacts or documents that are of scientific, cultural or historical interest for purposes of establishing or adding to collections. The development of collections is an ongoing process insofar as documentation work is carried out on existing collections as well as on newly located or acquired objects. Fieldwork, laboratory work and archival work are the methods used at this stage. The second stage of research is the analysis and interpretation of the information provided by the objects and documents in the collections. As a result of this analysis, knowledge regarding the Canadian heritage is deepened, new fields of research are explored and new working hypotheses are developed. Dissemination of the knowledge acquired through research activities appears to be the final but no less important stage of the work. The presentation role assigned to the Museum is performed at this stage.

Development of collections and analysis of the information acquired are phases of the work in which scientific researchers generally work alone. But this is not always the case, and researchers are called upon to work with employees whose classifications and training differ from their own. This is the case in certain fieldwork situations, or when the acquisition of objects or artifacts is being considered. A photographer, a

curator, a conservator, an audiovisual technician or employees responsible for safeguarding or transporting objects may then be called on to participate. Laboratory work may also require the participation of other employees, whereas it is highly unlikely that archival research will require the participation of other employees.

Dr. Paul Carpentier, who at the time of his testimony was Assistant Director of Collections and Research, described the issues and challenges of the coming years and explained how they will affect the work of scientific researchers. It is the Museum's intention to emphasize its role of presenting and disseminating knowledge, and this new thrust is likely to influence the way in which research is conducted. The intention to orient research work so as to promote the broad dissemination of knowledge by a variety of means has not always been as much in evidence as it has in recent years, especially since the coming into force of the Museums Act in 1990 and the opening of the new premises. Thus in the coming years, if research projects are to be approved by the employer they will have to be designed with an eye to exhibition projects or other forms of knowledge dissemination. As a result, the annual work plans prepared by scientific researchers will have to provide a stricter definition of research projects, in terms of both design and content, and a tighter framework for various stages of implementation. The time allocated for completion of a project becomes a decisive factor, for if a greater number of exhibitions are to be presented, then more research projects must be carried out, because the latter determine the themes and content of the exhibitions. This is one of the more obvious effects of

recent Museum policies on the work of the scientific researchers.

Dr. Carpentier described the unease that the announcement of this new policy appears to have caused among the scientific researchers. Before the Board, the latter did not express disagreement with the introduction of different terms governing the performance of their work, but rather the fear that the quality of their work would be affected by the requirement of a greater volume of research findings. They wish strongly that the specific characteristics and requirements of their work continue to be recognized and taken into account, especially in formulating annual work plans and in determining their conditions of employment.

2.2 Presentation

As to the role consisting of presenting and disseminating the knowledge acquired through research activities, this is carried out through the presentation of permanent or temporary exhibitions and the publication of popular or scientific works and exhibition catalogues. The Museum also offers educational and cultural services, in the form of interpretation activities, theatrical performances, audiovisual presentations and lectures. Such activities are usually related to the theme of an exhibition. In fact the Museum uses all means of dissemination that it considers appropriate to the circumstances.

The preparation and presentation of an exhibition are the culmination of an effort in which employees of different

classifications participate. In practice, these employees tend to come from the Research, Collections and Exhibitions and Program branches. An exhibition is developed around a proposed theme as formulated in a statement of intent. The theme is generally proposed by a scientific researcher and arises from his research activities. Researchers are not the only ones who may take such an initiative, but in practice they are the ones who do so, since they have the information and expertise required for this purpose. The proposal is then submitted for decision to the Museum committee responsible for the selection of exhibitions. If the project is accepted, a work group is formed consisting of the researcher, a project manager and a designer. At this stage of the project, the researcher has drafted and finalized an exhibition scenario based on the statement of intent. This scenario sets out in detail the themes of the exhibition, the means to be used in presenting and developing the messages, and the sequence to be followed. The scenario also indicates the choice of objects and documents to be exhibited, based on the ideas and concepts to be illustrated. In short, the researcher proposes a general scenario and the visual aids that he considers appropriate. He may also propose the use of supplementary means of communication, such as a brochure, a poster, a catalogue, theatrical or musical performances, and so forth.

The three-person work group, around which are assembled all the other employees involved in producing the exhibition, is the heart of the exhibition. Its first task is to develop the exhibition means and devices proposed in the scenario (visual presentation, posters, various activities, etc). It is at this point that the

Museum's other specialized services come into play. Thus, employees assigned to the conservation of artifacts are consulted in order to determine whether exhibiting an object would be risky considering its state of conservation and the way it is to be exhibited. The researcher may then alter his initial scenario or choice of visual aids if it is found that the object cannot be exhibited or that a different visual presentation would be more suitable. Educational and cultural services are responsible for the production of any interpretation activities or other events. The publishing unit is brought into play if a publishing project is proposed.

The production of an exhibition, based on the exhibition scenario prepared by the researcher, is carried out by persons qualified for the tasks that this stage requires: designers, curators, graphic designers, experts in publishing, cultural interpretation and others. The project manager co-ordinates the activities of all participants and is the person responsible for follow-through. At the production stage of an exhibition, participants from various fields interrelate. This is teamwork. The extent and frequency of this interaction vary. When the exhibition is in the preparatory stage, the core group meets more frequently and discusses a wider range of topics. However, as decisions are made, the responsibility for acting on them and carrying them through rests with the different specialized services. The researcher's participation then diminishes, since his involvement in the physical production of the exhibition is limited. He performs no supervisory role but remains responsible for the veracity, authenticity and scientific validity of all information communicated, whatever the medium chosen.

These rules governing the production and presentation of an exhibition are not new, and it was not established that there will be substantial changes to them in the near future.

3. Human Resources Management and Conditions of Employment

Ms. K. Elliott, Director of the Human Resources branch, explained the problems caused by the collective bargaining structure inherited from the federal Public Service; she argued that it was useless to maintain this system now that the Museum was managed as a stand-alone and integrated organization. The Museum is currently developing new personnel classification plans and new job descriptions. At the end of the hearings, neither of these two operations was completed, although the review of job descriptions appeared to be well on the way to completion. The latter task did not involve major changes but rather the updating of job content. On this point, Dr. Carpentier indicated that there were grey areas when it came to determining the classification to be assigned to a position. Thus it could be difficult to choose between SI -- persons so classified were represented by the Alliance and might have a university degree -- and HR. The decision was based on an evaluation of the relative importance of the different tasks of the position, to determine whether it primarily entailed data collection or scientific analysis.

Twenty-three collective agreements, including two framework agreements, currently govern the employees' conditions of employment. An examination of these

agreements indicates that the basic conditions of employment are comparable or of the same nature for all employee groups, although some differences exist. For example, the provisions relating to education leave are for all practical purposes identical, while participation in conventions, conferences, seminars or professional development activities is covered more specifically in the Institute's agreement. There is one major difference, relating to the mode of compensation when field work is performed. With regard to career advancement, the committee of peers that recommends the promotion of scientific researchers does not exist for the other employee groups. In that regard, the employer has proposed that this mechanism, inherited from the old system, be replaced with an internal mechanism of a similar nature. In terms of conditions of employment not covered by the collective agreement, sole occupancy of an office is a major item. The employer is in favour of providing an individual office to managers and persons performing confidential duties or creative tasks. Apart from managers, the scientific researcher group is the only one for which the employer makes such a condition available.

The proportion of work time that scientific researchers devote to teamwork is a matter on which the evidence is highly contradictory. According to Dr. Carpentier, this proportion is of the order of 60 %; for the scientific researchers, it is more like 30 %, with such interaction occurring only at clearly identified points in the performance of their work.

Decision

After examining the evidence and the arguments of the parties, the Board decides that two bargaining units are appropriate: one general unit, including all employees except the scientific researchers, and one unit for the scientific researchers, that is, employees who are classified HR and SE-RES and are currently in the Research branch. The evidence did not show that librarians, engineers and architects should be part of the scientific researchers' unit. They are therefore included in the general unit.

This is the third time that the Board has been called upon to review bargaining units after a segment of the public service of Canada has become subject to the Code. In Canadian Commercial Corporation (Board File no. 590-4), the Board found that employees who had formerly been governed by the Public Service Staff Relations Act and who had been grouped into six bargaining units should henceforth, under their new employer, form a single bargaining unit. In Canada Post Corporation (1988), 73 di 66, and 19 CLRBR (NS) 129 (CLRB no. 675), the Board reviewed the configuration of bargaining units after a Crown Corporation was formed to take over the management of the Canadian postal service. In that case, however, the Act to establish the Canada Post Corporation (Canada Post Corporation Act, S.C. 1981, c. 54) prevented the Board from reviewing the bargaining units before the expiry of a first collective agreement to be concluded between the new parties for the bargaining units in existence when the Crown corporation was created. The Board, when seized with an application for review under the Code, reorganized the bargaining units inherited from

the public service. In its decision, the Board found that four bargaining units should replace the 26 existing ones. In so doing, it took into account the situation that had existed before, when the postal service was under a public service department, as well as structural, operational and administrative changes that had occurred since the creation of the new entity and general principles relating to the determination of bargaining units.

In this regard the Board stated,

"*In matters of determining appropriate bargaining units, it is trite law that a labour relations board is vested with the ultimate discretion in determining what constitutes an appropriate bargaining unit as that issue is not a question of law but rather a factual determination that is dependent on the circumstances of each case (see La Commission des relations ouvrières de la province de Québec and Burlington Mills Hosiery Company of Canada Limited et al., [1964] S.C.R. 342; and Regina ex rel. United Steelworkers of America et al. v. Labour Relations Board (Sask.) and Noranda Mines Ltd. (1969), 69 CLLC 14,205 (SCC)).*

. . .
We emphasize that the criteria established over the years by this and other labour relations boards are guidelines to be followed, sign posts which may lead to a particular conclusions, but cannot and should not slavishly be followed. The reason for that is quite logically that no two cases involving the determination of appropriate bargaining units will ever be exactly the same.

. . .
In the instant case, we are cognizant of the fact that it is not our obligation to establish the most appropriate bargaining units. The statute talks only of appropriate bargaining units. Nonetheless it was our intention at the commencement of these proceedings, and it has remained our intention throughout, to establish bargaining units that most closely meet the needs of the employees and the employer today and in the future. The direction the Board has taken in the instant case has been to try to establish bargaining units that allow the employer to conduct its operations in as reasonable and logical a manner as possible while, at the same time, protecting the rights of employees as provided under the Canada Labour Code.

. . .
What we established as our principal objective is to ensure that the configuration of bargaining units that we determine allows and provides for employees the greatest benefit while employed with the Corporation,

to alleviate to the extent possible their considerable fears with regard to job security, and to permit the greatest amount of flexibility to employees in furthering their careers within the organization without being artificially restricted. This panel adheres to the philosophy that favours the formation of large bargaining units and looks with disfavour on the notion of the artificial fragmentation of bargaining units. Maintenance of that philosophy was an additional objective."

pages 90-91 and 153-154)

This panel of the Board agrees with the above statements of principle. In the instant case, it has given particular consideration to two other recognized criteria for the determination of bargaining units.

First, the community of interest. On the basis of this generally applicable criterion, the Board was able to assess how the interdependence and interrelationship of scientific researchers' duties and those of other employees -- which in the instant case express themselves through teamwork -- pointed to the existence of interests that were similar or sufficiently comparable to justify the inclusion of all employees in a single bargaining unit.

The employer argues that whatever the actual degree of interaction or interdependence among various categories of employees, once it is shown to exist, all the employees must be included in a single bargaining unit. That all employees work together to the fulfilment of the broad objectives of the organization is another factor that justifies a single bargaining unit. The latter proposition is obvious and true, and it applies to all undertakings in all fields, and not merely to the Museum. But this has not deterred labour relations boards from determining that several bargaining units are sometimes appropriate, nor has it restrained organizations from

efficiently managing their labour relations when dealing with several bargaining units. This moreover is what emerges from the testimony of Mr. Jacques Ouellet, Deputy Director of the Museum, regarding his previous work experience.

The history of certifications and negotiations is another criterion considered by the Board. The employer alleges that an application under section 47(3) of the Code must be dealt with in the same manner as if it were a first application for certification filed on behalf of the new staff of a new employer. The Board does not agree with this approach. In order to exercise its discretion correctly, it must take into account all the elements and all the criteria that it may draw on and apply the principles that govern the determination of bargaining units. While in strictly legal terms such an application involves a new employer and a new staff, this situation does not automatically bring about a radical change in the activities and operating procedures of the organization. The Board must assess individual cases in light of the particular facts. In the instant case, neither the general nature of the Museum's activities nor the procedures for carrying out those activities were changed when the Act establishing the Museum as an autonomous corporation came into force. In this regard, the historical criterion is a factor that may be taken into consideration because the preexisting facts still remain. Absent that situation, it would be just as appropriate to factor in the historical criterion, but with possibly a different conclusion.

The parties submitted to the Board a great number of authoritative cases. A number of them (see British

Columbia Ferry Corporation, [1977] 1 Can LRBR 526 (B.C.) and Canada Post Corporation, supra, were submitted by all the parties, while others (see Canadian Pacific Limited (1976), 13 di 13; [1976] 1 Can LRBR 361; and 76 CLLC 16,018 (CLRB no. 59) and Insurance Corporation of British Columbia, [1974] 1 Can LRBR 403 (B.C.) were submitted by the employer or the Alliance and the Institute. The fact that the parties refer to the same body of applicable rules relating to the determination of bargaining units indicates not only that the criteria involved are now well-established and recognized, but also that in applying these rules the Board must assess each case in light of the particular facts and the consequences and effects that will flow from its decision. The Board is well aware, then, that there is more than one possible approach. It must nevertheless, in rendering its decision, be satisfied that the configuration of units it establishes follows the generally accepted principles, that the units determined are viable and that a balance is achieved in respecting the interests of the parties involved.

In assessing the facts and applying the above criteria to the instant case, the Board paid particular attention to the nature of duties, the ways in which the work was performed and the cycle within which each set of duties is performed, as well as the specific interests of the scientific researchers with regard to the determination of working conditions.

The scientific researchers' work ensures that the first set of the Museum's objectives is fulfilled, namely the development of collections of objects of historical or cultural interest. This work is preliminary and indispensable to the fulfilment of the second set of

objectives, namely the dissemination of knowledge. For all practical purposes, the performance of research work is exclusively the domain of scientific researchers. The work is carried out in accordance with scientific standards and a methodology proper to a given discipline, and it requires thorough personal knowledge acquired through academic training, experience and expertise. At this stage of the work the handling and processing of objects in collections can bring into contact employees of different training. In this sense, scientific researchers' co-operation with other employees is not exceptional. However, it is limited to specific time periods and is incidental to the work of developing and analysing of collections. It varies depending on the nature of the research project, its stage of completion and the work methods suited to the discipline and favoured by the researcher himself/herself. The fact that research will now need to take greater account of the objective of presentation of knowledge does not alter the fundamental nature of the interactions involved in the performance of this work.

The dissemination of knowledge can take several forms. In the case of an exhibition, there is a work relationship between the scientific researcher and the other participants responsible for the production of the exhibition and parallel activities. Thus, the scenario developed by the researcher provides the necessary link between the scientific research findings and their concrete expression for purposes of dissemination. Once the scenario is accepted, the researcher's role, in relation to all the employees assigned to work on this mode of presentation, is to ensure the scientific and historical validity of the messages conveyed through the

vehicle chosen. There is, then, interrelationship and interaction among the employees concerned, the extent of which depends on the stage of the project. This constitutes teamwork. When a form of dissemination other than exhibition is chosen (such as a publication, a lecture or a course), the researcher's work no longer fits in the teamwork approach. Whether the researcher under these circumstances deals with personnel in the publishing or graphic design units in order to achieve proper physical presentation of a book, or other document, or a visual aid does not change the individual nature of his work, focussed as it is at that point on the dissemination of knowledge. The relationship with other specialized units of the Museum is in the form of requiring services from them, rather than participating in a team effort.

The Board considers that the nature and extent of the interdependance and interaction among work functions is of essential importance in determining whether teamwork is what is involved here and whether the extent of professional activities carried out in a teamwork mode is such that it justifies a single bargaining unit. The criterion of interrelation and interdependence of duties is not overriding here, and in the view of the Board does not outweigh the specific and individual nature of most components of scientific researchers' work. The nature and amount of the duties that researchers perform through teamwork are not important enough to require the inclusion of these employees in a general bargaining unit. The Board, it should be recalled, does not have to seek the most appropriate unit, but rather the unit that is appropriate in light of the facts of the case. This principle is observed here, along with that of seeking the smallest number of bargaining units, a principle that the

Board reaffirmed in Canadian Broadcasting Corporation (1991), as yet unreported CLRB decision no. 846.

The specificity of scientific researchers' work determines the specificity of their interests and needs when it comes to negotiating the content of their working conditions. The fact that the current collective agreements make no fundamental distinctions between the conditions applicable to scientific researchers and those applicable to the other categories of employees is not in itself a determining factor. It seems, rather, that certain differences (including provisions relating to occupational training, promotion, fieldwork conditions and salaries), as well as the employer's desire -- an entirely legitimate one -- to review certain work procedures in order to encourage optimal research work, are factors that favour the maintenance of the status quo with regard to the bargaining unit for scientific researchers. The similarity and specificity of the interests involved, as well as the number of employees affected -- approximately 35 -- are sufficient to convince the Board that a bargaining unit for these employees is viable.

The existence of a separate bargaining unit for the scientific researchers is not a hindrance to the fulfilment of the employer's statutory purpose, nor to the sound and efficient management of the organization in observance of the objectives of the corporate plan. Furthermore it offers a group of employees whose work and occupational training characteristics significantly distinguish them from all the other employees, an appropriate mechanism for negotiating their conditions of employment. This decision is not meant to fragment the bargaining units or to increase their number unreasonably.

It establishes a bargaining framework that ensures respect for and advancement of the parties involved.

Having considered the evidence, the Board finds that the position of curator of collections at the Postal Museum must be included in the scientific researchers' unit.

For all these reasons, the Board finds that the employees of the Museum must be grouped into two bargaining units: a general unit to represent all employees except scientific researchers, and a bargaining unit for scientific researchers, including the position of curator of collections at the Postal Museum.

This is an interim decision pursuant to section 20.1 of the Code. The Board is still in the process of completing its investigation with regard to the matter of bargaining agents' representation, following which proper decisions will be made.

The issue of employee status raised by the employer vis-à-vis certain incumbents of positions will be examined later through a process to be communicated to the parties.

This is a unanimous decision of the Board.

Louise Doyon
Louise Doyon
Vice-Chair

J. Jacques Alary
J. Jacques Alary
Member

Francois Bastien
Francois Bastien
Member

ISSUED at Ottawa, this 30th day of April 1992.

CCRT/CLRB - 928

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SUMMARY

CANADA POST CORPORATION,
APPLICANT, AND BERMILINE JOLLY,
RESPONDENT..

Board File: 530-2053

Decision No.: 929

Application for reconsideration pursuant to section 18 of the Canada Labour Code (Part I - Industrial Relations).

In Bermiline Jolly (1991), as yet unreported CLRB Decision no. 909, the Board upheld a complaint filed pursuant to section 133(1) of the Canada Labour Code (Part II - Safety and Health) alleging that Canada Post had disciplined the complainant, contrary to section 147(a), for exercising her right to refuse unsafe work. The original panel concluded that the complainant's refusal to unload a monotainer containing foreign parcels, after developing an itch in her hands while performing her work, was based on "genuine safety concerns".

The reconsideration panel held that section 128 does not confer a right to refuse based merely on "genuine belief". For a right of refusal to arise, there must be a finding that an employee had "reasonable cause" to believe that danger existed. In the instant case, it is impossible to determine whether the original panel addressed the "reasonableness" of the complainant's belief. The matter is therefore returned to original panel for determination of that issue.

RÉSUMÉ

SOCIÉTÉ CANADIENNE DES POSTES,
REQUÉRANTE ET BERMILINE JOLLY,
INTIMÉE

Dossier du Conseil : 530-2053

Décision n° : 929

Demande de réexamen fondée sur l'article 18 du Code canadien du travail (Partie I - Relations industrielles).

Dans Bermiline Jolly (1991), décision du CCRT no. 909, non encore rapportée, le Conseil a fait droit à une plainte déposée en vertu du paragraphe 133(1) du Code canadien du travail (Partie II - Sécurité et santé au travail). Dans cette affaire, la plaignante avait allégué que la Société canadienne des postes, en violation de l'alinéa 147a) du Code, avait pris à son égard des mesures disciplinaires parce qu'elle refusait d'effectuer un travail qu'elle estimait dangereux. Le banc initial du Conseil saisi de la plainte en était arrivé à la conclusion que le refus de la plaignante de décharger un monoteneur contenant des colis de l'étranger, après que ce travail eut provoqué des démangeaisons, était fondé sur de «vérifiables inquiétudes en matière de sécurité».

Le banc de révision conclut que l'article 128 du Code ne confère pas un droit de refus fondé uniquement sur la «véritable conviction» qu'il existe un danger. L'exercice du droit de refus doit reposer sur la conclusion qu'il était «raisonnable de croire» qu'il existait un danger. Or il est impossible, en l'espèce, d'établir si le banc initial du Conseil a cherché à déterminer si les craintes de la plaignante étaient «raisonnables». L'affaire est donc renvoyée au banc initial afin qu'il se penche sur cette question.



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REASONS FOR DECISION

Canada Post Corporation,
applicant,
and
Bermiline Jolly,
respondent.

Board File: 530-2053

The reconsideration panel was composed of Mr. J.F.W. Weatherill, Chairman, Ms. Louise Doyon and Mr. J. Philippe Morneault, Vice-Chairs.

Appearances (on record)

Mr. Ian Szlazak, for the applicant;
Mr. David I. Bloom, for the respondent.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

The applicant applies under section 18 of the Canada Labour Code for reconsideration of the decision issued by a panel consisting of Board Member Calvin B. Davis in the matter of the complaint in Bermiline Jolly (1991), as yet unreported CLRB Decision no. 909. In that decision the Board upheld Ms. Jolly's complaint, filed pursuant to section 133(1) of the Code, alleging that her employer, Canada Post Corporation, had disciplined her contrary to section 147(a) for exercising her right to refuse unsafe work pursuant to section 128(6) (sic: section 128(6) does not create the right to refuse; that is created by sections 128(1) and 128(8); we consider

that in the circumstances Ms. Jolly's refusal was purported to be made pursuant to section 128(1)).

There is, for the most part, no attack on the description of the facts set out in the Board's decision. The complainant, a mail sorter, developed an itch in her hands while performing her work. She considered this to be a reaction to certain foreign parcels. She then refused to unload a monotainer containing such parcels, although she continued to unload other monotainers and to sort other parcels. This was noticed by a supervisor who instructed the complainant to unload the monotainer in question. When, a while later, the supervisor noticed this had not been done, she spoke to the complainant again, and on that occasion the complainant told the supervisor that that type of mail made her itchy. This constituted a "report" to the employer within the meaning of section 128(6) of the Code, although it does not appear that Ms. Jolly reported the circumstances to a member of the safety and health committee or to a safety and health representative, as required by sections 128(6)(a) and (b). As the Board found, the employer did not meet the requirements of section 128(7) in the circumstances, and did not investigate the report in the manner set out in that provision.

The complainant was thereafter disciplined, and the allegation is that the employer imposed a penalty because the complainant had acted in accordance with Part II of the Canada Labour Code. To impose a penalty for that reason would be an offence under section 147. Provision is made in section 133 for the filing of a complaint in that regard, and the complainant availed herself of that

recourse. By section 133(6), the burden of proof is on the party alleging that the contravention did not occur, and in this case the employer so alleges. Before the employer need meet this onus, however, the employee must satisfy the Board that, to use the language of section 147(a)(iii), she "has acted in accordance with this part", and in particular, to use the language of section 128(1)(b), that she had "reasonable cause to believe" that a condition existed which constituted a danger to her.

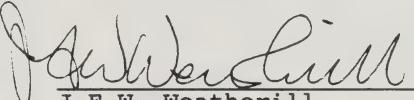
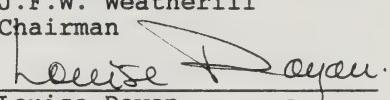
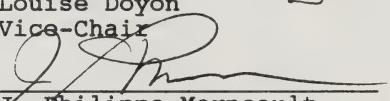
In the case before us, the original panel put the issue thus, at page 8: "The Board must ask itself if Ms. Jolly's refusal was motivated by genuine safety concerns." In a number of past cases pursuant to section 133(1) of the Code the Board has indifferently used the expression "genuine safety concerns" to mean either "reasonable cause to believe" as expressed in section 128(1)(b), or to distinguish a genuine refusal from a false one based on some ulterior motive other than safety. Generally, in these past cases, it was relatively easy to determine the sense in which the expression "genuine safety concerns" has been used. When the issue in the case was whether "reasonable cause to believe" existed, the expression "genuine safety concerns" appears to have been used in that sense, but when the issue was whether the refusal was genuinely based on the safety grounds, the expression "genuine safety concerns" appears to have been used in the latter sense.

The Code, however, in section 128, does not confer a right to refuse based merely on "genuine belief". The

refusal, to have the protection of the Code, must be made in circumstances where there is "reasonable cause" for such belief. In the instant case, the panel obviously considered that Ms. Jolly's belief was a sincere one, and thus that it was genuine in that sense of the term. That is not a conclusion with which there is any ground to interfere, nor is there any ground to interfere with the finding that Ms. Jolly did indeed refuse to perform certain work on the ground of apprehended danger. It is not possible to determine, however, on a reading of the decision in the instant case, whether the expression "genuine safety concerns" was also used in the sense of "reasonable cause to believe" and it is impossible to determine if the question of whether or not the complainant had "reasonable cause to believe" has been answered by the original panel. Such a determination must be made if there is to be found to have been a refusal of the sort protected by section 128.

We would stress, as the Board has done before, that it is not necessary, in cases such as this, that there be a finding of actual "danger" within the meaning of section 122(1) of the Code. It is not necessarily unreasonable to be wrong, as the Board has said (see David R. Holloway (1991), as yet unreported CLRB Decision no. 835, cited at page 7 of the original decision in this case). An employee seeking the protection of the Code must, however, have reasonable cause to believe that there is a danger "to the employee" (under section 128(1)(b)) or "to the employee or another employee" (under section 128(1)(a)).

There must, for a right of refusal to arise, be found to be "reasonable cause" for an employee's belief in the existence of danger. In the instant case, while it is clear that the original panel found that Ms. Jolly's belief was a genuine one, it is impossible to determine whether the reasonableness of that belief was addressed. That is a factual question, and in accordance with the Board's practice in such cases, the matter is returned to the original panel for determination of that issue.


J.F.W. Weatherill
Chairman

Louise Doyon
Vice-Chair

J. Philippe Morneault
Vice-Chairman

DATED at Ottawa, this 13th day of May 1992.

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Summary

CANADIAN UNION OF POSTAL WORKERS, COMPLAINANT UNION, AND CANADA POST CORPORATION, RESPONDENT EMPLOYER.

Board Files: 745-4015
745-4021

Decision No.: 930

Employees of Canada Post Corporation at its priority courier unit in Richmond, B.C. and at the mail processing plant in Campbell River, B.C. engaged in legal rotating and on-the-job strike activities against the Corporation between August 23, 1991 and September 5, 1991. The employer responded by barring them from their work.

The Canadian Union of Postal Workers, on behalf of the employees, complained that Canada Post's reaction to the employee activities constituted punishment and discipline for engaging in legal strike activities, contrary to section 94(3)(a)(vi) of the Canada Labour Code (Part I - Industrial Relations).

The Board found, in effect, that the barring of the employees constituted legal lockout activity by the employer, and not discipline, and was therefore not in violation of section 94(3)(a)(vi).

Résumé de Décision

SYNDICAT DES POSTIERS DU CANADA, PLAIGNANT, ET SOCIÉTÉ CANADIENNE DES POSTES, INTIMÉE.

Dossiers du Conseil: 745-4015
745-4021

No de Décision: 930

Des employés de la Société canadienne des postes, affectés au service de poste prioritaire à Richmond (C.-B.) et à l'établissement de traitement du courrier à Campbell River (C.-B.), ont participé à des grèves légales (tournantes et en milieu de travail) entre le 23 août 1991 et le 5 septembre 1991. L'employeur a réagi en leur interdisant l'accès au lieu de travail.

Le Syndicat des postiers du Canada, au nom des employés, s'est plaint que la réaction de la Société à ces activités constituait des sanctions et des mesures disciplinaires imposées aux employés parce qu'ils avaient participé à une grève légale, en violation du sous-alinéa 94(3)a)(vi) du Code canadien du travail (Partie I - Relations du travail).

Le Conseil a jugé en fait que le geste posé par l'employeur constituait un lock-out légal, et non une mesure disciplinaire, et n'enfreignait donc pas le sous-alinéa 94(3)a)(vi).



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Labour
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Canadien des
Relations du
Travail

Reasons for decision

Canadian Union of Postal Workers,

complainant union,

and

Canada Post Corporation,

respondent employer.

Board Files: 745-4015
745-4021

The Board consisted of Vice-Chairman Thomas M. Eberlee and Members Evelyn Bourassa and Michael Eayrs.

Appearances:

Donald Crane, for the Canadian Union of Postal Workers; and George Fuller, for Canada Post Corporation.

These reasons for decision were written by Vice-Chairman Eberlee.

I

At a hearing in Vancouver on April 9, 1992, the Board had before it two complaints by the Canadian Union of Postal Workers (CUPW) alleging that Canada Post Corporation (CPC) had violated section 94(3)(a)(vi) of the Canada Labour Code (Part I - Industrial Relations) in its treatment of certain employees at the priority courier unit (PCU) in Richmond, B.C., and the mail processing plant in Campbell River, B.C., between August 23, 1991 and September 5/6, 1991 during the period when CUPW was conducting "rotating strikes" against CPC.

Section 94(3)(a)(vi) of the Code reads as follows:

"94.(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

...

(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part; ..."

Fortunately for the Board - as well as for themselves - the parties had been able to agree on basic statements describing the facts underlying both complaints; these statements not only helped to abbreviate the Board's hearing but also brought clearer focus to the issues in dispute.

In essence, the question for the Board to decide is whether Canada Post's response to certain rotating strike activity by employees at the Richmond priority courier unit and the Campbell River processing plant was of a disciplinary character, specific punishment for engaging in strike activity, and therefore proscribed by section 94(3)(a)(vi) in the context of a legal strike, or whether it was something else, such as a defensive rotating lockout, not prohibited by the Code.

II

The Richmond priority courier unit receives and distributes priority courier mail requiring overnight delivery. According to the agreed statement of facts this special mail arrives at the PCU facility, where some 129 members of CUPW's Vancouver local sort it and forward it to its proper geographic destination. The employee group consists of inside sorters and outside drivers.

On Monday, August 26, 1991, members of the Vancouver local set up picket lines. Employees at the PCU also withdrew their labour and began picketing. This activity ceased the next day. As PCU employees reported for work on their various shifts on August 27 and 28, 1991, they were directed by Ron Featherstone, the facility manager, not to work there and were told that there was alternative work available for them at the Vancouver main mail processing plant. During August 28, the unit was operated by non-union personnel.

The agreed statement of facts elaborates somewhat on various conversations and encounters which occurred at this time. Paragraph 13, on page 4, reads in part as follows:

"13. On August 28, 1991, the Union began picketing the P.C.U. at about 7:00 a.m. During the morning of the 28th, the Vancouver Local president, Brian Charlton, had a telephone discussion with Mr. Featherstone (the P.C.U. manager) concerning the events at the P.C.U. Mr. Featherstone advised Mr. Charlton that the P.C.U. employees would not be allowed to work at the P.C.U. for the duration of the strike period until a new collective agreement was signed so as to not 'jeopardize' the product. ... He stated that the action taken was not a lock-out."

On the evening of August 28 and into the morning of August 29, there were conversations between Mr. Featherstone and picketers concerning a possible return to work at the PCU. The picketers were, in fact, allowed to go back to their jobs at noon on August 29. Normal work shifts continued until the early morning of September 3, 1991 when strike activity and picketing of most Vancouver-area facilities, including the PCU, began again. This disruption continued until the early morning of September 4, 1991, when all picketing ceased. PCU employees attempted to return to work but were denied admission to the facility.

The Board was told that some of the PCU employees, at various times during the period when the unit was closed to them, worked at the Vancouver main processing plant. Mr. Featherstone testified that neither he nor any CPC official ordered or directed employees to report for work at the Vancouver plant. They were not "transferred" from the PCU operation to the Vancouver plant. They were simply told that work was available for all of them there; they were not "suspended", nor were they threatened with discipline; it was entirely up to them whether they worked or not, elsewhere than at the PCU operation.

Employment did finally return to normal at the PCU during the shifts starting on September 5 and 6, 1991, when all official rotating strike and lockout activity ceased in order to facilitate mediation by Chief Justice Alan B. Gold.

III

The Campbell River complaint (file 745-4021) involved CUPW members who are letter carriers. According to the agreed statement of facts, there are some 30 letter carriers working out of this facility. On August 26, 1991, at 7:30 a.m., the local CUPW executive held a "study session" with members working at the facility, including the letter carriers. They "discussed ways of carrying out concerted workplace activities which would be protected by section 94 of the Canada Labour Code. The executive read aloud excerpts from the C.L.R.B.'s Graham Cable decision [(1985) 12 CLRBR (NS) 1] and handed out an information sheet..."

Those attending the study session "decided that the clerks would work at a deliberate pace and that the letter carriers would restrict their mail processing and delivery to 1st Class mail by giving it priority over other classes".

There was then a full work stoppage at the Campbell River operation which lasted until the evening of August 28, 1991. The next morning, letter carriers and other employees reported to the Campbell River facility, but before going to work they held another short study session.

The agreed statement of facts sets out the story as follows:

"13. *The study session lasted about 20 minutes. The Local's executive advised the members to renew the job action and give priority to processing and delivering 1st Class mail.*

14. The letter carriers then returned to their work duties, including sorting mail for 24 mail delivery routes. The various classes of mail are mixed together and must be sorted by each carrier before delivery.

15. On three occasions during the sortation that morning, all the carriers were assembled and spoken to in a group by the Superintendent, Mr. Kotyluk.

16. On each of the three occasions, Mr. Kotyluk advised the employees to stop the job action. On the second occasion, Mr. Kotyluk stated that the members were engaging in strike activity and that if they ignored his instructions, they would have to leave the premises.

17.A) On the first occasion at about 8:10 A.M. M. Kotyluk instructed the employees to deliver all of the mail that was assigned to each of them. In response, Diane Kaysser told the employees to sort only the mail the Union told them to sort.

17.B) On the second occasion at about 8:30 A.M. M. Kotyluk repeated the instruction to the employees to deliver all of the assigned mail. He also said that if all the mail is not taken out the Corporation would consider them continuing the strike and such employees must then leave the building. D. Kaysser responded that this was a legal strike action and that the employees would continue to do what the union said.

17.C) On the third occasion, at about 9:45 a.m., Mr. Kotyluk warned the employees that if they did not sort and deliver all the classes of mail, they would be considered to be on strike and would not be paid for the shift. Trevor Berry, the president of the Local, advised Mr. Kotyluk that such an action by the Corporation would violate the Code. He also advised Mr. Kotyluk that if the Corporation was dissatisfied with the employees' job action, the Corporation had the option of a lock-out. He asked Mr. Kotyluk if the Corporation was locking out the employees. Mr. Kotyluk replied, 'No'.

18. Following sortation, the carriers proceeded to deliver the mail they had sorted."

That evening, August 28, CPC management attempted to reach 11 carriers, who had refused to deliver anything but first-class mail, to tell them that this action

constituted a strike and that they were not to return for work at the facility for "the duration of the strike". The next morning, when 10 of these letter carriers reported for work (one of the 11 called in sick), they were denied entry to the postal facility. Fifteen others who had not participated in the first-class-only exercise were allowed in for work. When the "prohibited employees" asked why they had been denied entry, the facility superintendent read a one-sentence statement: "What you did yesterday constitutes strike action and you are not to return to the facility for the duration of the strike".

Shortly afterwards, nine of the 10 barred employees managed to find their way into the facility and began to process mail for their usual routes. Management directed them to leave the premises and threatened them with action for "trespassing" if they did not do so immediately. Management also told them that they would be charged with theft if they took any mail away from the premises. Two of the barred employees did as directed, but the union president persuaded them to return to the plant. The employees continued working, the RCMP was called by Canada Post but refused to become involved. Management attempted, but failed, to prevent barred employees from proceeding to deliver mail on their regular walks.

According to the agreed statement of facts, a Canada Post labour relations officer, when asked specifically if CPC's actions were a lockout, replied, "No", and stated that it was not Canada Post's policy to lock out employees.

However, in a letter dated September 2, 1991, the manager of labour relations for the Pacific Division, Paul Straszak, advised the local president as follows:

"This will advise you that management has the right and authority to determine the preparation and delivery of all mails. Consequently, in response to your actions of the past week and your written intention to continue a program of ignoring direct instructions, all members of the Campbell River Post Office who are members of the CUPW are hereby locked out and are not to report for work. This lockout is effective immediately and will continue for the duration of the legal strike period."

All employees returned to their normal duties on September 5 and 6, 1991, following the signing of the back-to-work agreement between the parties which remained in effect while mediation was under way.

During the course of these confrontations between CUPW and the "barred" letter carriers on the one hand, and Canada Post on the other, efforts were made by both sides to claim the ground that best suited their offensive and/or defensive purposes.

CUPW was letting it be known to its membership and to Canada Post that, while they were engaging in a legal, rotating strike, they had the Canada Labour Relations Board on their side as per Graham Cable TV/FM (1985), 62 di 136; 12 CLRBR (NS) 1; and 85 CLLC 16,058 (CLRB no. 529), which meant that action by the employer against individuals such as occurred here to counter rotating strike tactics would be interpreted by the Board as discipline, contrary to section 94(3)(a)(vi). The gist of correspondence from CUPW to Canada Post, particularly a

letter from the local president, dated August 30, 1991, seemed to be that members of CUPW, in exercising their legal right to strike while at the same time reporting for work, could run the postal system as they saw fit, contrary to the orders of their bosses, and that the bosses, if they tried to take the offensive in reply would be violating the Code. The president of the local accused CPC of attempting to discipline employees, contrary to the Code. He suggested that if Canada Post "didn't like our actions you could lock us out".

Canada Post, for its part, until September 2, when it officially announced a lockout of all CUPW members in Campbell River, denied when questioned by CUPW representatives that its counter-measure of banning the 10 or 11 employees from work constituted a lockout.

It seems that Canada Post, for public relations purposes, avoided the word "lockout" until head office authorized its use on and after September 2. Mr. Straszak, the Pacific Division manager of labour relations, sought to explain the Corporation's delicacy in this matter. He testified that CPC had made commitments to its customers and the public generally that it would attempt to continue operating regardless of CUPW's tactics. The word "lockout" was shunned so as not to perturb customers and the public, and thus possibly drive away business. However, according to Mr. Straszak, what actually happened at the PCU and Campbell River, with Canada Post telling groups of employees not to report for work, was lockout action by the employer, no matter how it might have been described or not described at the time.

As was suggested at the beginning of these reasons, the basic question for the Board to decide is whether the employer's conduct toward the PCU and Campbell River employees was punitive in the same sense as the employer's illegal behaviour in the Graham Cable case (and in other similar cases decided by the Board) or whether it was something not prohibited by the Code.

In the Graham Cable case, the union and the employer were in a legal strike and lockout position. The union had not engaged in a general walkout, but its supporters were putting pressure on the employer, while remaining on the job, through such means as refusing to perform all of the functions normally expected of them, working to rule or slowing down their pace of activity. The Board found, in effect, that these employee tactics constituted strike action - that the employees by engaging in these tactics and doing these acts - were in fact participating in a strike not prohibited by the Code. The employer had responded by directly disciplining individuals with warnings and suspensions for the specific acts they had engaged in. The employer was quite open at the time about the fact that the discipline was intended to punish the individuals for these acts as well as to deter them from repeating them.

The Board found, however, that Graham Cable had violated section 94(3)(a)(vi) of the Code in that it had applied discipline or punishment to persons because they had participated in a strike that was not prohibited by the Code.

In Graham Cable, supra, the Board advanced the proposition that

".... almost any concerted activity on the part of employees in relation to their work would fall within the protection contemplated by [that section] of the Code. We say almost any activity because it goes without saying that however broad the protection under the Code, it cannot be used to shield criminal or other unlawful acts."

(pages 149; 12; and 14,390)

No doubt recognizing that the effect of its finding and determination might be misunderstood or misapplied in the future, the panel went on to say the following:

"Where does that leave employers? Are they left defenceless once a trade union is in a lawful strike position? We think the Ontario Labour Relations Board's comments, when they were faced with similar circumstances to what we have here, are most appropriate: (*The Corporation of the City of Brampton, [1981] 2 Can LRBR 65*, at pages 69-70; emphasis added):

'It perhaps bears repeating that our conclusion follows from the definition of the term "strike" set out in the Act. In most instances, the definition acts in management's interests in that employees cannot during the term of a collective agreement act in concert to refuse voluntary overtime as a means of restricting or limiting output. Indeed, as noted above, in the one previous instance where the City's transit drivers did impose a ban on overtime, it was the Union which stepped in and convinced the employees to cease their conduct as being unlawful. However, the other side of the definition is that it makes a concerted refusal to work overtime a right of employees when they are in a legal strike position. Such action may well result in disruptions to an employer's operations and a corresponding increase in the union's bargaining power, but that is the scheme envisaged by the Act. An employer, for its part, is free to take measures designed to limit the disruptive effect of this type of strike activity, such as the increased use of managerial personnel and non-striking employees. An employer is also free to take responsive action through

its right to lock out employees. An employer is not, however, free to discipline or punish employees for engaging in a lawful strike.'

We concur with that assessment of the situation and adopt it as our own. Disruption of an employer's normal operations is what a strike is all about and provided the employees are participating in lawful strike activities their employer is prohibited from taking any of the actions against them that are spelled out in s. 184(3)(a)(vi)."

(pages 149-150; 14; and 14,390)

Another panel of the Board, writing in Rogers Cable T.V. (British Columbia) Ltd. (1987), 69 di 17; and 16 CLRBR (NS) 71 (CLRB no. 616), took a somewhat less adamant stand against discipline per se in the context of a legal strike. The Board said:

"...It seems to us that it is the misuse of discipline that is the target of the section, not its general prohibition. The section is designed to protect the basic freedoms enshrined in ... the Code which guarantee the right of employees to join a trade union of their choice and to participate in its lawful activities. . . ."

(pages 32; and 87)

The evidence before us is that Canada Post Corporation considered the continuing and uninterrupted operation of the Richmond priority courier unit to be a matter of prime importance. A stoppage occurred and CUPW members withdrew their services and set up a picket line. After a day or so, employees sought to go back into the PCU to do their regular work. They were barred from the place, but told there was work available for them - if they wanted work - at the Vancouver postal plant. Meanwhile Canada Post used non-union labour to keep the PCU going. At that point, Canada Post did not want to risk disruption of its

sensitive PCU operation and, in effect, told employees they could do their striking somewhere else.

A day or two later, that particular episode of rotating strike activity ceased. With matters settling down, the doors of the PCU were reopened to the CUPW employees. Another day or two of more or less normal activity ensued until once again these employees walked off the job and set up a picket line early on the morning of September 3, 1991. When that round of rotating strike activity ceased about 24 hours later and PCU employees tried to return to the job, they were again barred until the back-to-work agreement went into effect for the September 5/6 shifts.

One could argue that, technically, Canada Post might appear to have been in conflict with section 94(3)(a)(vi) of the Code because on two occasions, in response to legal strike activity, the employer did "refuse to employ and to continue to employ" the PCU people. But one would have to concede that Canada Post only refused to employ them at the PCU and was willing to employ them at another facility. Counsel for CUPW argued that Canada Post transferred them, contrary to the Code, but the evidence shows that they were not actually transferred from the PCU to the Vancouver plant, but rather were offered employment there as an alternative since employment was not going to be available for them at the PCU. The union also argued that the barring of the employees from the PCU constituted suspensions, which are equally forbidden by section 94(3)(a)(vi).

CUPW's position in the final analysis was that Canada Post acted against the employees in retaliation or punishment

for engaging in strike activity; it was trying to deter them from striking. However, the evidence shows that at no time did the employer actually make an admission such as occurred in the Graham Cable case that its action constituted discipline; on the other hand it refused to put any label on what it did and denied at the time that it was a lockout.

Canada Post's treatment of the 10 Campbell River letter carriers who refused to deliver anything but first-class mail was much less generalized than the PCU barring of CUPW members. The union claims that because Canada Post pin-pointed specifically the individuals involved, it was clearly a suspension of persons who did engage directly in legal strike activity. Canada Post barred these people from employment only because of their particular conduct; by selecting individuals, rather than the whole group, CPC discriminated against them, contrary to the Code. If all Campbell River employees had been locked out - which did not happen until after September 2 - there would have been no discrimination.

Each of these situations is rife with technicalities that would delight the most assiduous of barrack-room lawyers. Many of them have been alluded to; some would earn points for CUPW and others for CPC. In some ways, and at first glance, there are similarities here to the Graham Cable story, but, the evidence, taken as a whole, suggests that these situations were actually quite different.

Employees at both the PCU and Campbell River who were engaging in legal strike activity were refused employment and were, in a technical sense, suspended because they

engaged in that legal strike activity. That activity was not conventional strike activity in which all or most of the members of the unit withdraw their labour and set up picket lines and seek to shut down the employer's operations until the pressure of a shut-down forces concessions from the employer. This, in the case of the PCU and Campbell River was more complex and sophisticated. At the PCU, the union obviously intended to put pressure on the employer through regular attendance and work by employees, punctuated by sudden short and unexpected withdrawals of labour that were intended to "jeopardize the product" (as CPC spokesperson phrased it) and cause customers to go elsewhere for courier services. At Campbell River, the idea was that the pressure would take the form of simply not doing the job normally expected of a letter carrier, that is, delivering only first-class mail and boycotting the other things that customers pay Canada Post to distribute to the public.

In the Graham Cable case, the quorum of the Board made the point (which has been quoted at page 11), with which we agree, that an employer does not have to accept passively anything that may occur by way of rotating strike action; while it cannot discipline employees for engaging in legal strike activity, it can lock them out.

The Code defines "lockout" as follows:

"'lockout' includes the closing of a place of employment, a suspension of work by an employer or a refusal by an employer to continue to employ a number of his employees, done to compel his employees, or to aid another employer to compel his employees, to agree to terms or conditions of employment."

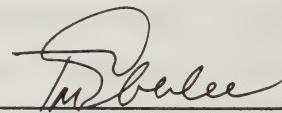
There is nothing in the Code which suggests that a lockout is not a lockout if it is not a general shut-down. In other words, just as a legal strike can be, and is, the sort of behaviour by employees as was described in Graham Cable, supra, or the periodic walkouts at the PCU, or the refusal to handle anything but first-class mail by some 10 or 11 out of a much larger number of employees at Campbell River, so, too, can a lockout be a rotating affair, designed to isolate specific groups of striking employees and to insulate an employer's operations from their specific activities.

It is well known that, frequently, when a group of employees decides to take legal strike action, an employer responds by declaring a lockout. To suggest that this is something different or nobler than "retaliation" for the strike activity is to ignore the realities of the gives and takes that occur in collective bargaining. When collective bargaining reaches the stage where there is no prospect of an agreement being secured through negotiations while people remain at work and operations continue on their normal course - and a legal strike or lockout becomes the only means by which the parties can put pressure on each other to try to force a settlement - what occurs can often be described by such terms as "retaliation", "punishment", "pressure", "intimidation", by each side against the other. To suggest that a union can engage through legal strike action in activities which have the effect of being "retaliation", "punishment", "pressure", "intimidation", all designed to force an employer to agree to terms satisfactory to the union, but to say that an employer cannot respond in a similar way via lockout activities is to put in place a balance in the

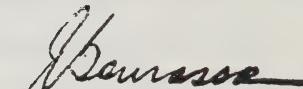
industrial relations system that was never intended. Of course, the degree of "retaliation", "punishment", "pressure", "intimidation" or whatever that may legitimately be practised by either party against the other is constrained by such rules in the Code as the duty to bargain in good faith, and others, and by the strictures of the Criminal Code. So absolutely all is not fair in love, war and collective bargaining - but a great deal is. In short, not all "retaliation" for legal strike activity runs afoul of section 94(3)(a)(vi).

The line between legitimate employer reaction to employee/union legal strike activity and illegitimate employer response "à la Graham Cable" is not easy to define for any and all purposes and at this point appears to be capable of being drawn only on a case-by-case basis. In these Canada Post cases, we see no signs of employees actually having been disciplined or threatened with discipline as occurred in the Graham Cable situation: documentation of specific employee activities considered by the company to be deserving of discipline because the employees failed to do their jobs and/or follow orders; announcements that there would be progressive discipline for "infractions" by way of written warnings, then suspensions without pay, then dismissal, and finally, actual implementation of those announcements.

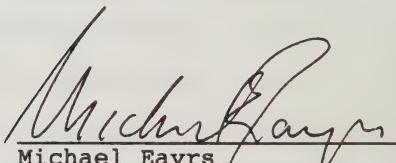
The overwhelming weight of the evidence convinces this panel that Canada Post's actions at the PCU and Campbell River, which are complained of by CUPW, were simply lockouts, for brief periods, of specific groups of employees, which had the same ultimate purpose for C.P.C. as the employee actions had for CUPW - to put pressure on the other party to compel it to come to terms. Canada Post's activities were not prohibited by section 94(3)(a)(vi) of the Code and the complaints should therefore be dismissed.



Thomas M. Eberlee
Vice-Chairman



Evelyn Bourassa
Member of the Board



Michael Eayrs
Member of the Board

ISSUED at Ottawa, this 14th day of May, 1992.

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Summary

BRINK'S CANADA LIMITED, EMPLOYEUR,
AND INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN, AND HELPERS OF
AMERICA, LOCAL UNION 419, AND
CERTAIN INDIVIDUALS.

Board File: 725-314

Résumé de Décision

BRINK'S CANADA LIMITED, EMPLOYEUR,
AINSI QUE LA SECTION LOCALE 419 DE
LA FRATERNITÉ INTERNATIONALE DES
TEAMSTERS, CHAUFFEURS, HOMMES
D'ENTREPÔT ET AIDES D'AMÉRIQUE ET
CERTAINS PARTICULIERS, INTIMÉS.

Decision No.: 931

Dossier du Conseil: 725-314

No de décision: 931

Brink's Canada Ltd. decided to cut costs by reducing certain full-time employees in Toronto to the status of part-timers. Under the collective agreement between Brink's and the Teamsters Union, rather than accepting part-time status (with a roughly 33 1/3 per cent reduction in pay) employees had the option of either bumping into full-time jobs occupied by less senior employees in other divisions or electing to be laid off.

Brink's Canada Limited a décidé de réduire ses coûts en accordant aux employés à plein temps dans la région de Toronto le statut d'employé à temps partiel. La convention collective conclue entre l'employeur et le syndicat des Teamsters permettait aux employés qui ne voulaient pas accepter un emploi à temps partiel (ce qui représente une baisse salariale d'un tiers) de supplanter des employés ayant moins d'ancienneté dans d'autres divisions ou de choisir la mise à pied.

According to the evidence, only one employee opted for part-time status. Brink's ignored the choices of the others and scheduled them all to work on a part-time basis. After having it confirmed by Brink's supervisors that they would have to work as part-timers, and the bumping option not being available at the time, a number of employees in effect placed themselves on lay-off status. Brink's interpreted their refusal to work part-time as an unlawful strike. The Board concluded that it was not and dismissed Brink's application under section 89 of the Canada Labour Code (Part I - Industrial Relations). The Board also dismissed the union's counter-claim that Brink's had locked out the employees.

D'après la preuve produite, seulement un employé avait accepté un emploi à temps partiel. Brink's n'a pas tenu compte du choix des autres employés et leur a confié du travail à temps partiel. Après avoir obtenu la confirmation des superviseurs de Brink's qu'ils devraient effectuer du travail à temps partiel, et que la possibilité de supplantation n'existaient pas à ce moment-là, un certain nombre d'employés se sont effectivement placés dans une situation de mise à pied. Selon l'interprétation de Brink's, leur refus de travailler à temps partiel constituait une grève illégale. Le Conseil a jugé que ce refus ne constituait pas une grève illégale et il a rejeté la demande de Brink's fondée sur l'article 89 du Code canadien du travail (Partie I - Relations du travail). Il a en plus rejeté la prétention du syndicat que Brink's avait imposé un lock-out aux employés.



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Reasons for decision

Brink's Canada Limited,

employer,

and

International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Local Union 419, and certain individuals,

respondents.

Board File: 725-314

The Board consisted of Vice-Chairman Thomas M. Eberlee and Members Calvin B. Davis and Michael Eayrs.

Appearances:

George Vassos, for Brink's Canada Limited; and Norman L. Jesin, for the respondents.

These reasons for decision were written by Vice-Chairman Eberlee.

I

At a hearing in Toronto on April 28 and 29, 1992, the Board had before it an application by Brink's Canada Limited for a declaration that certain of its employees in Metropolitan Toronto were engaging in an illegal strike, contrary to section 89 of the Canada Labour Code (Part I - Industrial Relations). The employer asked the Board to order employees, among other things, to cease and desist from engaging in an illegal strike and both the union and the employees to take steps to bring the work situation back

to normal.

The Teamsters union not only denied that an illegal strike had occurred, but also alleged that Brink's were engaging in an illegal lockout of employees, contrary to section 89 of the Code, and were also in violation of sections 94 and 96 because of other actions which the company had taken vis-à-vis the union and/or employees.

After listening to the employer's case, the Board decided that there existed no violation of section 89 by either the union, individual union members or the employer. The Board decided that the union's allegations respecting violations of sections 94 and 96 would be dealt with later in another proceeding.

The Board advised the parties orally that it was dismissing the company's section 89 application against the union and the following union members named therein: Doug Power, John Hurd, Cindy-Lee Acorn, Stuart Bailey, Gordon Blunt, Mike Caranica, Francis Dimond, Michel Donovan, Paul Evelyn, John Mulgrew, Laurie Treadwell and Lana Wilson. Based on the facts adduced in evidence during the presentation of the company's case, the Board also stated that the company had not imposed an illegal lockout on the employees and that this claim by the union should be dismissed. The Board undertook to explain its reasons in writing at a later date and does so herein.

II

The employees involved in this matter are messengers, drivers and guards who have assigned routes to travel via armoured vehicles to service, and replenish, the money supplies of automatic teller machines (ATM's) located throughout the greater Toronto area. Until April 27, these employees were classified as full-time with a guarantee of at least a 40-hour week. They were paid at rates for messengers, drivers and guards running from approximately \$16 per hour to \$14.50 per hour, depending on the job.

The Board was told that early in April the company decided to save money by changing the status of employees from full-time to part-time, although there had been no decline in its business according to one of the company's witnesses. Employees were advised on April 9, 1992.

Under the collective agreement, part-time employees are persons "not regularly scheduled for forty (40) hours of work in five (5) days or less per week, nor guaranteed pay in lieu thereof" (Article I(f)). Part-timers are paid roughly \$5.00 per hour less than full-timers for doing the same work.

The collective agreement appears to outline how and on what basis the employer can change people from full-time to part-time status: "In the event the work requirements of the EMPLOYER shall be reduced due to loss of business or curtailment of the EMPLOYER's operation, to the point that forty (40) hours of work shall not be regularly available

to all divisional full-time employees, the EMPLOYER shall have the right to reduce the work force ..." (Article VII(e)). Then a displaced employee has the right to accept part-time status or bump a more junior person in another division (provided the bumper is qualified for the job of the bumpee) or elect lay-off.

III

The evidence before the Board was that since early 1992, the company had hired a substantial number of new employees, as part-timers. In fact, about 30 were hired in the three weeks before April 27. Although this consideration was not a factor in the Board's ultimate decision, it is worth noting in passing that the company seems to have enlarged the actual number of its employees, rather than having to reduce that number because of some "loss of business or curtailment of the employer's operation," and virtually all of the added employees have been taken on as part-timers.

By mid-April, the company circulated a document to each of the full-time employees advising them that "work requirements of Brink's Canada Limited have been reduced to the point that forty hours of work will no longer be available to you as a full time employee" and that they "must" now choose in writing whether to bump a junior employee in some other division (provided they were qualified to do the job), accept part-time status or "elect lay-off."

One employee chose to accept part-time status, a number chose not to respond to the document at all and a roughly similar number opted to bump more junior full-timers in other divisions. The reactions of the employees became known to the company early in the week ending Saturday, April 25. The company chose to ignore them at that time.

Normally the schedule of routes and work assignments for the next week is made available to employees on Wednesdays. The schedule for the week beginning after April 25 did not appear until Friday. On it, most of the hitherto full-time employees were given assignments and routes calculated at less than 40 hours for a week's work. The company decided that these employees were going to become part-timers immediately, notwithstanding the fact that only one had actually opted for part-time status.

IV

ATM dispatch supervisor Eldon Glaeser was on duty at Brink's Toronto headquarters from Sunday evening, April 26 until 7:00 a.m., April 27. Two employees came in and spoke to him around 9:00 p.m. on April 26. They asked him what their employment status was; he replied that the schedule sheet indicated they were part-timers. They said to him they did not elect to work part time and they left the building.

About 5:30 the next morning people who had been full-time ATM employees began coming in for their assignments. Mr. Glaeser spoke to nine of them at various times between 5:30

and 6:00 a.m. (Most of them were among the group of employees listed on page 2 who were named in the company's application as alleged illegal strikers.) Union steward Russ Munro was present for most, if not all, of the conversations. With each of the nine, the talk went along the following lines: the employee asked what his or her status was; Mr. Glaeser replied that it was now part-time; the employee responded by saying that he or she did not choose to be part-time; the employee then left him and subsequently did not perform any work.

Mr. Glaeser testified under cross-examination by counsel for the union that he told a number of these employees - but not all of them - that they might as well punch out their time cards and leave if they did not elect to work as part-timers. He told the Board they punched out and left at his suggestion. He did not demand that they stay and perform their scheduled routes. He testified that two or three of the employees asked for their separation slips and he told employees "they might as well get their papers, too, when they said they weren't electing part-time status and were leaving." Mr. Glaeser stated that the two employers he had spoken to on Sunday evening told him they would be calling back in the morning regarding their "papers."

According to the testimony of David Crosby, the ATM dispatch manager, there was no difficulty on April 25 and 26 with the few employees who retained full-time status. Four were scheduled to work on April 26 and four did in fact work. Difficulties arose on April 27 with people who had been reduced from full-time to part-time status without

their consent. Mr. Crosby spoke to many of them. A typical conversation went like this: Mr. Crosby was asked (in some cases by the union steward who was present for some of the conversations), if he could verify the individual's status; he replied that the person was now part-time; the employee then stated that he or she had been hired to do full-time work, had not elected to do part-time work and the company should telephone him or her when full-time work again became available. Three to five people told him they would expect to receive their separation documents within the next week because they would be going on unemployment insurance. He did not think that the word "lay-off" came up in any of his conversations.

Mr. Crosby testified that his supervisor informed him on April 7 that the status of employees was going to be changed. All full-time employees would be offered the choice of part-time status or lay-off. He understood that if people were unwilling to accept part-time status, then the only alternative was lay-off. The schedule for the week after April 25 was drawn up so that all routes became part-time rather than full-time and the assumption was made (in spite of the documents signed by employees in which they opted to bump into jobs held by more junior people) that everybody would simply accept part-time status and report for part-time work.

Since each employee he talked to on Monday morning stated that he or she was not accepting part-time employment, he felt the logical conclusion was that each was electing lay-off, because the employer had done nothing to implement the bumping alternative which many had opted for. Questioned

by the Board, the company advised that it had not responded to, or taken steps to implement, the documents signed by individual employees in which they had chosen the bumping option. The Board was assured that the company intended to communicate to the employees but had not done so yet.

It is clear to the Board that Brink's chose to assume when formerly full-time employees elected not to work for the company in a part-time capacity, that they were opting to strike illegally, rather than deciding to take lay-off which was obviously open to them under the collective agreement.

A strike is defined in the Code as follows:

"strike' includes a cessation of work or a refusal to work or to continue to work by employees, in combination, in concert or in accordance with a common understanding, and a slowdown of work or other concerted activity on the part of employees in relation to their work that is designed to restrict or limit output."

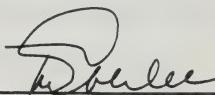
Among other things, an illegal strike is one that occurs during the life of a collective agreement and before the conciliation requirements of the Code are met. If this had been a strike, it would have been illegal as to its timing.

In the Board's opinion, this was not a strike. Employees were offered the option of accepting part-time employment, bumping other more junior employees providing they had the capacity to do their jobs or going on lay-off. One person opted for part-time employment. Some of the rest refused

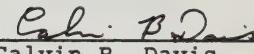
to fill in the "election document." Some chose the bumping option. The company ignored the employees' choices and decided that they were all going to be part-timers as of April 26 (and then looked to the Board to act as the enforcer of this edict). In other words, the company denied them the bumping option at that time and offered only part-time status. Certain of the employees simply said, "No thanks," and did not accept the new assignments. It is clear from their actions that they elected to go on lay-off and in fact did put themselves in lay-off status, even though that particular term may not have been used in their conversations with Mr. Glaeser and Mr. Crosby. No evidence was placed before the Board that they opted for lay-off status "in combination, in concert or in accordance with a common understanding."

When they went in to work and discovered that the company was not offering the bumping option and was, in effect, offering them either part-time work or the door, they took the door, as they had the right to do under the collective agreement. This did not amount to a strike. Moreover, the Board is strengthened in its view by the admission of the company's own dispatcher that he told a number of the employees that they might as well leave if they did not elect to be part-timers and by the evidence that a number asked for their separation papers so that they could go on unemployment insurance while they awaited recall to full-time jobs.

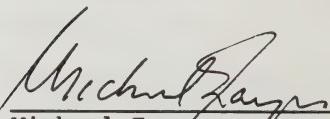
Since the Board's finding was that the employees did not engage in an illegal strike, but rather chose to go on lay-off, the union's claim that the company locked them out could not be sustained and was also dismissed.



Thomas M. Eberlee
Vice-Chairman



Calvin B. Davis
Member of the Board



Michael Eayrs
Member of the Board

ISSUED at Ottawa, this 21st day of May 1992.

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Summary

GENERAL TRUCK DRIVERS AND HELPERS
LOCAL UNION NO. 31 OF THE
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA, APPLICANT;
AND DELTA BUS LTD., EMPLOYER.

Board File: 555-3397

Decision No.: 932



Résumé de Décision

LA SECTION LOCALE 31 (GENERAL TRUCK DRIVERS AND HELPERS) DE LA FRATERNITÉ INTERNATIONALE DES TEAMSTERS, CAMIONNEURS, HOMMES D'ENTREPÔT ET AIDES D'AMÉRIQUE, REQUÉRANTE, ET DELTA BUS LTD., EMPLOYEUR.

Dossier du Conseil: 555-3397

Décision n°: 932

These reasons deal with an application for certification where a dispute arose over the appropriateness of the bargaining unit in that the employer wanted to extend the application to include employees working for a related company. The Board's constitutional jurisdiction over the operations of the employer also became an issue, and the Board received a petition from a group of employees opposing the application. The group included all of the employees who had signed union membership cards upon which the Board usually relies to ascertain the wishes of the employees as of the date of the filing of an application for certification.

Les présents motifs portent sur une demande d'accréditation qui a amené un différend sur l'habileté d'une unité à négocier collectivement: l'employeur voulait élargir la portée de la demande de façon à inclure les employés qui travaillaient pour une société apparentée. En outre, la compétence constitutionnelle du Conseil à l'égard de l'exploitation de l'employeur est devenue une question à trancher, et le Conseil a reçu une pétition d'un groupe d'employés qui s'opposaient à la demande. Le groupe comprenait tous les employés qui avaient signé des cartes d'adhésion au syndicat, sur lesquelles se fonde habituellement le Conseil pour déterminer les désirs des employés au moment où la demande d'accréditation a été présentée.

After receiving further particulars by way of a supplementary report by its investigating officer, the Board found that it did have jurisdiction over the operations of the employer. The Board also declined to include the employees of the related employer in the bargaining unit. As for the wishes of the employees, the Board was satisfied that the employees had been influenced by employer involvement after the filing of the application; therefore, it relied on the membership cards as of the date of the filing of the application and certified the union.

Après avoir obtenu d'autres renseignements au moyen d'un rapport supplémentaire de l'agent enquêteur, le Conseil a jugé qu'il avait la compétence voulue à l'égard de l'exploitation de l'employeur. Le Conseil a aussi refusé d'inclure dans l'unité de négociation les employés qui travaillaient pour l'employeur apparenté. Quant aux désirs des employés, le Conseil est convaincu que les employés ont été influencés par l'employeur après la présentation de la demande; par conséquent, il s'est fondé sur les cartes d'adhésion au moment de la présentation de la demande d'accréditation et a accrédité le syndicat.

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Reasons for decision

General Truck Drivers and
Helpers Local Union No. 31 of
the International Brotherhood
of Teamsters, Chauffeurs,
Warehousemen and Helpers of
America,

applicant,

and

Delta Bus Ltd.,

employer.

Board File: 555-3397

The Board was composed of Vice-Chairs Hugh R. Jamieson
and J. Philippe Morneault, and Member Mary Rozenberg.

Appearances: (on record)

Messrs. Garnet Zimmerman and Ernie Nial, for the
applicant;

Mr. Peter A. Gall, for the employer; and

Mr. Colin G.M. Gibson, for a group of affected
employees.

The reasons for this decision were written by Vice-Chair
Hugh R. Jamieson.

I

These reasons deal with an application for certification
which was filed on December 17, 1991 by the General
Truck Drivers and Helpers, Local Union No. 31 of the
International Brotherhood of Teamsters, (the union or
Local 31) seeking bargaining agent status to represent
a group of employees working for Delta Bus Ltd., (the
employer or Delta). In its response to the application

the employer raised certain issues, including the appropriateness of the bargaining unit applied for. In this regard the employer submitted, among other things, that the bargaining unit should include employees working for Baron Limousine Service Ltd. (Baron) which is a related company that has common ownership and management with Delta and, it operates out of the same premises.

The question of the Board's constitutional jurisdiction over Delta also arose as the primary business of the employer is the operation of a school bus service within the Municipality of Delta, B.C. The employer does, however, also operate charter trips to other provinces in Western Canada and into the United States.

Also, a group of seventeen employees filed a petition opposing the application and it turned out that these persons represented the totality of the union's membership support as of the date of the filing of the application. As the Board normally relies on the union's membership in the bargaining unit as of the date the application is filed, this caused the Board to take a second look to ensure that it was appropriate to apply this practice in these circumstances.

On March 26, 1992, after reviewing the submissions of the parties on the foregoing issues as well as the investigating officer's initial report, this quorum of the Board requested further particulars by way of a supplementary report from its investigating officer. This additional report came to the Board dated April 30, 1992 with the parties having until May 11, 1992 to make any further submissions on the contents of the report.

The union and the employer responded but took no real issue with the facts contained in the report.

II

Dealing first with the Board's constitutional jurisdiction over Delta, the question is whether the employer's transportation operations fall within the heading under section 92(10)(a) of the Constitution Act, 1867:

"92. *In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,*

...

10. Local Workers and Undertakings other than such as are of the following Classes:

(a) Lines of Steam and other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province; ..."

(emphasis added)

The primary consideration when determining if a transportation operation connects provinces or extends beyond the limits of a province within the meaning of section 92(10)(a) is whether the extra-provincial aspect of the business is regular and continuous. Occasional or irregular extra-provincial activities do not transform a provincial undertaking into a federal undertaking. The leading cases in this regard are Attorney-General for Ontario et al. v. Winner et al., [1954] 4 D.L.R. 657; and [1954] A.C. 541 (P.C.); Regina v. Cooksville Magistrates Court, Ex Parte Liquid Cargo

Lines Ltd., [1965] 1 O.R. 84 (H.C.J.); Regina v. Toronto Magistrates, Ex Parte Tank Truck Transport Ltd., [1960] O.R. 497 (H.C.J.); and Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 et al. (1983), 44 O.R. (2d) 560; and 84 CLLC 14,006 (C.A.).

According to the information obtained by the Board's investigating officer, Delta apparently does operate extra-provincially on a regular and continuous basis. In 1991, for example, there were sixty or so trips outside the boundaries of British Columbia. Most of these trips were to destinations in the United States such as Portland, Bellingham and SeaTac Airport at Seattle. Other trips went as far as Florida, Yukon, and Alaska. During the months of May to September, Delta operated a charter bus service regularly to the Rockies in Alberta and back. While all of these extra-provincial charter trips are on a demand basis, they do appear to us to be of the regular and continuous nature that is necessary to convert Delta from a provincial undertaking to a federal work, undertaking or business within the scope of section 92(10)(a) of the Constitution Act, 1867 and we so find.

Turning to the issue of whether Baron employees should be included in the appropriate bargaining unit, we have little or no hesitation in rejecting this proposal by the employer. To do so would place unnecessary and artificial hurdles in the way of the employees who have opted to exercise their rights under the Code to participate in collective bargaining. This, the Board

is always reluctant to do, particularly where employees are exercising their rights under the Code for the first time:

"The Board's policy regarding the appropriateness of bargaining units in applications like we have here is well settled. Where unorganized employees are exercising their right to participate in collective bargaining the Board will provide a meaningful opportunity for them to do so and it will not frustrate these fundamental rights by insisting upon artificial or unnecessary bargaining unit configurations. In these situations the Board will accept bargaining units that are somewhat less than the most appropriate unit regardless of whether this might cause administrative inconvenience for the employer. (For an overview of these policies and an example of their practical application see Sedpex Inc. (1985), 63 di 102 (CLRB no. 543) and Purolator Courier Ltd. (1989), 77 di 1 (CLRB no. 730))."

(Alberta Wheat Pool (1991), unreported Board decision no. 907 at page 7)

In the circumstances here, it probably would be more convenient administratively for the employer if all of the employees involved in both operations were included in a single bargaining unit, however, this is outweighed by the consideration of affording the Delta employees a meaningful opportunity to exercise their rights under the Code. It is therefore the finding of the Board that the appropriate bargaining unit includes:

"all employees of Delta Bus Ltd., working in and out of the Province of British Columbia, excluding the manager, dispatcher and office staff"

This bargaining unit resolves a dispute between the parties over the inclusion or exclusion of the dispatcher. The union wanted the dispatcher included, however, in light of the nature of dispatch functions

in the transportation industry where work assignment is key, it is not the Board's normal practice to include them in bargaining units along with those whom they dispatch. Another issue that was raised by the Board itself was the appropriateness of including the incumbent Clerk, Peggy Cheng, in the bargaining unit because of her relationship with the Director of Delta, Ms. Barbara Cheng. According to the supplementary report of April 20, 1992, Peggy Cheng is Barbara Cheng's sister-in-law. On that basis, it is the ruling of the Board that Peggy Cheng should be excluded on familial grounds.

The only other outstanding issue going to the appropriateness of the bargaining unit was whether an accountant/part-time driver should be excluded. This was raised by the employer. It is the ruling of the Board that office staff are excluded, therefore, it is left to the parties to resolve the issue of what this person's primary functions really are.

III

The last issue, which is the wishes of the employees, does cause the Board some concern in this case where all of the members claimed by the union opposed the application by way of a petition. As we pointed out, it is a longstanding and well known policy and practice of the Board to determine the wishes of employees by way of union membership cards as of the date of the filing of an application for certification. Seldom is any weight attached to employee petitions that come in after

that date. The reasons for this approach were canvassed at length recently in Alberta Wheat Pool, supra, and we do not intend to go into them in any great detail here. Clearly, the main purpose is to eliminate, or at least reduce, the opportunity for employers to become involved in or to interfere with the freedom of choice of employees during this extremely sensitive period when they are exercising their rights under the Code. We agree wholeheartedly with the Board's approach in this regard, however, we are also mindful that policies such as this cannot be applied so rigidly as to fetter the discretion and duty of decision-makers like ourselves to look at each individual matter coming before us and to admit exceptions to the Board's stated policies in appropriate cases (see New Brunswick Broadcasting Co. Limited (1988), 75 di 101 (CLRB no. 711)).

Here, the totality of the union support indicated a change of heart immediately following the filing of the application which is very unusual. Furthermore, they hired counsel who filed a petition on their behalf and asked for party intervenor status. In his communication to the Board, counsel had identified the seventeen employees by name and forwarded a copy to the other parties. The Board's rule of confidentiality vis-à-vis employee wishes had thus been circumvented which was why the Board was not concerned about revealing their names when it asked for public particulars surrounding the origin of the petition. Clearly, what the Board was looking for were signs of employer involvement.

In the Board officer's supplementary report of April 30, 1992, there is an account of the employee's version of the circumstances leading to the signing of union

membership cards and of the events following the employer becoming aware of the application for certification which resulted in the apparent change of heart by the group as a whole. There having been no exception taken by the parties to the contents of this report, the Board has to take this version of the facts as being accurate. This being so, the Board can only conclude that these employees were indeed influenced to a great extent by their employer after meetings with representatives of management where the employer's view of the possible ramifications of unionization were expressed.

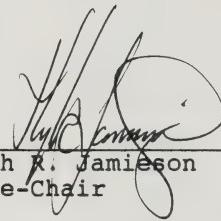
Let us say immediately that we are well aware that there are no unfair labour practice complaints against the employer and we obviously make no finding that there has been any breach of the Code on the employer's part. However, what this type of employer involvement does, is that it creates a situation where it is virtually impossible for the Board to be satisfied about the freedom of any wish expressed by the employees at this time should the Board be inclined to order a representation vote.

The end result is that the Board is left with only one alternative, which is to stay with the well proven practice of relying on the union membership cards as proof of the wishes of the employees as of the date of the filing of the application for certification. This way the Board can be sure that there was no taint of employer involvement and the purposes of the Code are achieved in that collective bargaining at least gets a chance and the employees will have an opportunity to participate. They will also be made to realize, as

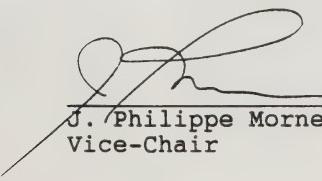
should all employees in the federal labour relations community, that the Board attaches a lot of importance to signatures on trade union membership cards and that joining a union is a serious commitment that ought not be taken lightly. Once signed in support of an application for certification, membership applications cannot be retracted that easily, particularly after the application has been filed.

Taking the union membership cards into account as of the date of the filing of this application for certification, the Board is satisfied that the union did enjoy a majority support of the employees in the bargaining unit which the Board has found to be appropriate. Therefore, a certification order will be issued pursuant to section 28 of the Code.

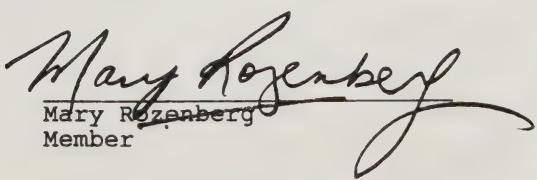
The foregoing is a unanimous decision of the Board.



Hugh R. Jamieson
Vice-Chair



J. Philippe Morneault
Vice-Chair



Mary Rozenberg
Member

DATED at Ottawa this 25th day of May, 1992.

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Summary

DONALD H. MOLE AND ROBERT S. SAULNIER, COMPLAINANTS, AND ENERGY AND CHEMICAL WORKERS UNION, RESPONDENT UNION, AND PROVOST BULK TRANSPORT INC., EMPLOYER AND INTERESTED PARTY.

Board Files: 745-3934
745-3960

Decision No.: 933

Résumé de Décision

DONALD H. MOLE ET ROBERT S. SAULNIER, PLAIGNANTS, SYNDICAT DES TRAVAILLEURS DE L'ÉNERGIE ET DE LA CHIMIE, INTIMÉ, ET PROVOST BULK TRANSPORT INC., EMPLOYEUR ET PARTIE INTÉRESSÉE.

Dossiers du Conseil: 745-3934
745-3960

No de Décision: 933

When Provost Bulk Transport Inc. was formed from an amalgamation of two separate companies, the Energy and Chemical Workers Union (ECWU) won the right to represent all of the employees. They had previously been represented by the ECWU and the Teamsters respectively in the two companies.

New seniority lists were drawn up by the ECWU and the company bringing the two groups of employees together. ECWU policy was to use a particular formula for the placement of former ECWU employees and former Teamsters employees on a new list; this formula and its effect were disputed by former Teamsters employees, including particularly those at Sarnia; they complained to the Board that the ECWU's handling of their placement on the Sarnia list violated the duty of fair representation of section 37 of the Canada Labour Code (Part I - Industrial Relations).

The Board found that the ECWU's approach was not unreasonable and that there was no evidence which could lead it to conclude that the union's formula or its application were in themselves discriminatory, arbitrary or in bad faith or were in any other way contrary to section 37 of the Code. The complaints were dismissed.

Lorsque Provost Bulk Transport Inc. est devenue une société par suite de la fusion de deux compagnies distinctes, le Syndicat des travailleurs de l'énergie et de la chimie (STEC) a acquis le droit de représenter tous les employés. Ces employés étaient auparavant représentés par le STEC et le syndicat des Teamsters.

Le STEC et l'employeur ont dressé une nouvelle liste d'ancienneté pour réunir les deux groupes d'employés. Pour dresser cette liste, le STEC voulait utiliser une formule particulière. Les anciens membres du syndicat des Teamsters, et surtout ceux en poste à Sarnia, ont contesté l'emploi de cette formule et ses répercussions; ils ont déposé une plainte auprès du Conseil alléguant que le STEC avait mal traité de la question de leur placement sur la liste d'ancienneté de Sarnia et avait donc manqué au devoir de représentation juste prévu à l'article 37 du Code canadien du travail (Partie I - Relations du travail).

Le Conseil a jugé que l'approche adoptée par le STEC n'était pas déraisonnable et que rien dans la preuve ne l'aménait à conclure que la formule élaborée par le syndicat et son application n'étaient en elles-mêmes discriminatoires, arbitraires ou de mauvaise foi ou de toute autre façon contraires à l'article 37 du Code. Les plaintes ont été rejetées.



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Travail

Reasons for decision

Donald H. Mole and
Robert S. Saulnier,
complainants,
and
Energy and Chemical Workers
Union,
respondent union,
and
Provost Bulk Transport Inc.,
employer and interested party.

Board Files: 745-3934
745-3960

The Board consisted of Vice-Chairman Thomas M. Eberlee and
Members Calvin B. Davis and Michael Eayrs.

Aparances:

Pierre A. Sadik, for the complainants;
Daniel Ublansky, for the respondent union; and
John Coleman, for the respondent.

These reasons for decision were written by Vice-Chairman
Eberlee.

I

At a hearing in Toronto on April 14, 1992, the Board
considered complaints by Donald H. Mole and Robert Saulnier
alleging violation of section 37 of the Canada Labour Code
(Part I - Industrial Relations) by the Energy and Chemical
Workers Union (ECWU) in its handling of their placement on
the seniority list of employees of Provost Bulk Transport
Inc., particularly in respect of their home base in Sarnia,

Ontario.

II

In 1989, Provost Cartage Inc. (Provost) bought Bulk Carriers Limited (Bulk) and amalgamated the two companies as Provost Bulk Transport Inc. (Provost Bulk). The employees of Provost were represented by the ECWU, while the employees of Bulk were represented by the Teamsters Union. For a short time after the amalgamation, the new company continued to operate what were, in effect, two wings, one the former Bulk operation and the other, the former Provost operation. This was especially the case at Sarnia, where two separate terminals served the customers of the two former firms. The bargaining units remained in existence for a short period and then the new company applied to the Board under section 18 of the Code for a review and merger of the two units. The Board granted the application and ordered a vote to determine whether the employees now wished the Teamsters or the ECWU to represent them. Not surprisingly, the ECWU won, since it had represented some 400 or 500 employees at Provost, while the Teamsters had represented only about 150 at Bulk. The Board certified the ECWU as the bargaining agent for the whole group on December 27, 1990. Shortly thereafter the ECWU and the company agreed that the ECWU collective agreement would apply to all employees and the Teamsters agreement would cease to operate.

The Board was told that the Teamsters and the ECWU campaigned actively for the support of employees prior to the vote. While the Teamsters collective agreement could be viewed as more favourable in terms of wages and

benefits, the creation at the various terminals of one seniority list combining the Provost and Bulk people was apparently the issue of greatest concern, especially to the former Provost employees.

The Teamsters position throughout the campaign was that the two groups should simply be dovetailed on the new, single terminal seniority list; that is to say, everybody should be listed in accordance with his (or her) years of service for either company. The ECWU stand, which was made widely known throughout the entire employee group, and had been arrived at via decisions made by the ECWU membership at general union meetings, was that the new seniority lists should be developed on a 3-to-1 ratio basis. Under this approach, the list would consist of the three senior Provost (ECWU) people in descending order from the most senior, then the most senior Bulk (Teamsters) person, then the next three senior Provost people, then the next most senior Bulk person, and so on. The 3-to-1 ratio was also roughly the ratio of total Provost employees to Bulk employees.

According to Keith Dexter, a Provost driver who serves as Ontario vice-president of the ECWU, discussions commenced in the summer of 1989, long before the ECWU was certified to represent the whole employee group, concerning how new seniority lists should be developed. At this time, the new company, Provost Bulk Transport Inc., determined that it would put together the actual operations of its former Provost and Bulk wings. This meant in the Sarnia area, for example, that one or other of the former Provost or Bulk terminals would be shut down and operations would be consolidated at one location, with all drivers from the two

previous employers working out of that location. The two Sarnia-area terminals were united in 1991.

The Board understands that at Sarnia, the Bulk operation was somewhat older than the Provost business. Hence, Bulk employees had been hired earlier and tended to have longer service records. When the ECWU won the union election and it entered into negotiations with the employer, the collective agreement then produced included a new Sarnia seniority list based on the 3-to-1 ratio approach. The result in Sarnia was that the new list came out with the most senior person (a former Provost employee) having a starting date of February 1, 1969, the next two Provost people having starting dates of January 1, 1970 and June 1, 1971, and the first Bulk employee having a starting date of November 15, 1954, and so on down the list. Complainant Saulnier, with a starting date of June 19, 1968 (more than 6 months earlier than the most senior person on the new list), appeared as number 41 on the list. Had the list been dovetailed, he would have come out around number 12. Mr. Mole moved to number 43 or 45 on the list (depending on how one reads it) from number 26 on the former Bulk list.

The Board was told that the effect of dovetailing in Sarnia would have been to place all of the former Provost drivers behind all of the former Bulk drivers. This would have considerably disadvantaged them. The rationale for a 3-to-1 approach was to give a greater degree of fairness to both groups as they worked in a merged operation. The Bulk drivers before the merger got their pick of the best and most lucrative assignments at their terminal based on their seniority. So did the Provost drivers at their terminal.

Dovetailing, so the Board was advised, would have meant that the Bulk group, being an older group, would have won the best assignments from both former terminals and all of the Provost people would have been relegated to what would have been regarded as the less desirable assignments. In Sarnia, the first former Provost employee to be able to bid for an assignment would have been approximately number 20 on the list. Dovetailing would have over-benefited the former Bulk people by giving them first opportunity to obtain both Bulk and Provost "choice" assignments and would have under-benefited the former Provost people by pushing them down the seniority list and thus depriving them of even the choice Provost customer assignments they had enjoyed when the two wings of the business were separate. The 3-to-1 formula ensured that there was a more equitable sharing of the best assignments by both Bulk and Provost people working together to serve the merged customer group.

The Board was told that the new list was the product of collective bargaining. In effect, it emerged as a provision of the collective agreement that was brought into operation by agreement of the employer and the ECWU to apply to all of the employees in the new, merged and much enlarged Provost Bulk bargaining unit. Based as it was on a 3-to-1 formula, it was a compromise between dovetailing which would not have been as beneficial to the former Provost employees and such an extreme solution as "end-tailing" (simply adding the seniority list of the former Bulk employees on to the end of the seniority list of the former Provost employees) which would have greatly disadvantaged the former Bulk people.

Complainant Mole filed a grievance respecting his placement on the new seniority list. The union refused to pursue it on the ground that Mr. Mole's placement on the list was correct, based upon the policy adopted by the union and implemented via the collective agreement, and that there was no violation of the collective agreement. The union took the same stand with Mr. Saulnier and other grievors who did not file complaints with the Board. Counsel for the union made the point, which we cannot dispute, that if the union had decided to pursue these grievances to arbitration - grievances that ran counter to its own policy on the seniority list - it would have been in bad faith vis-à-vis the company.

III

The question for the Board to decide is whether in its conduct surrounding and underlying the adoption and implementation of the 3-to-1 formula, the union has violated section 37, which reads as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The 3-to-1 formula was adopted by one of the unions contending for the right to represent the Provost Bulk employees as best satisfying the interests of its own members but offering a measure of equity to employees from both wings of the merged company. The dovetailing formula was known to be the alternative that would be implemented

should the Teamsters win the vote. Everything was out in the open; the employees made a decision by way of a secret ballot in the course of deciding to select the ECWU as their bargaining agent. There was a clearly identifiable rationale for both positions. The Board does not see the 3-to-1 formula as being unreasonable, although some other formula might have been a closer approximation to perfect justice. Bearing in mind the years-of-service situation in the merged Sarnia terminal, we doubt that dovetailing could commend itself as actually being more reasonable than the 3-to-1 formula; it would have come down hard on the former Provost people. And we are quite certain that end-tailing of the former Bulk people would have been unreasonably disadvantageous to them.

In voting for the ECWU, which was advocating the 3-to-1 approach, the employees made a choice which apparently accorded more closely to the best interests of the majority, but which cannot be said to have done unreasonable violence to the minority. The union then went on to implement the 3-to-1 approach.

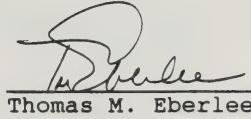
When the two formerly separate bargaining units were amalgamated and one union finally emerged as the bargaining agent for all of the employees, it became necessary for seniority lists to be amalgamated as well. Quite obviously new seniority lists combining all employees had to be created as a matter of priority. That in itself is not something deserving of complaint. What the complaint is actually all about is the way in which this was done and about the final product of the exercise. During the course of that exercise choices had to be made. The union, based upon the mandate it had received from the

majority of employees, chose one approach. This particular approach, in our view, was not in itself unreasonable. However, the complainants would have preferred another.

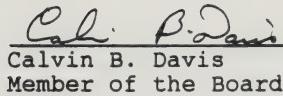
In attacking what the union has done, and in advancing their alternative, the complainants have presented no evidence that would lead us to believe that the union's formula, its mandate or its final choices constituted in themselves or were motivated by discrimination, arbitrariness or bad faith or any other factor or consideration that might conceivably be contrary to section 37 of the Code.

Finally, we have one further difficulty with these complaints, and that is that they are really directed at what seems to be a provision of the collective agreement and may in fact be outside our jurisdiction. The seniority list, as we have suggested, appears to be in itself the product of collective bargaining, just like any other provision of the collective agreement, and as such not normally capable of being the subject of a section 37 complaint. Both the language of section 37 and the Board's jurisprudence confine the possible subject matter of a section 37 complaint to employees' "rights under the collective agreement", in effect to the administration of the existing provisions of the collective agreement. Section 37 was not intended to be applied to regulate the actual contents of a collective agreement to provisions such as a collectively bargained seniority list.

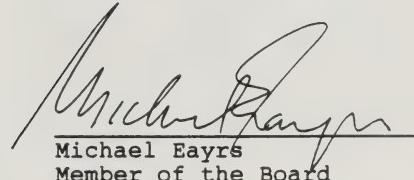
Our conclusion is that these complaints are without merit
and shall be dismissed.



Thomas M. Eberlee
Vice-Chairman



Calvin B. Davis
Member of the Board



Michael Eayrs
Member of the Board

ISSUED at Ottawa, this 25th day of May 1992.

CLRB/CCRT - 933

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Summary

PATRICK R. RIDGE, COMPLAINANT, AND
CANADIAN PACIFIC RAIL, EMPLOYER.

Board File: 950-214

Decision No.: 934

These reasons deal with a complaint under Part II of the Canada Labour Code (Occupational Safety and Health) where the complainant alleged that the employer had violated section 147 by disciplining him because he exercised his right to refuse to do certain work that could have exposed him to PCB's.

The complaint was dismissed. In the circumstances, the Board found that the complainant had not been disciplined because he exercised his rights under Part II of the Code; he was disciplined because he refused to shave which would have allowed him to be properly fitted for a respirator that the safety director had directed be worn. In these brief reasons, the Board re-emphasized that its limited role under Part II of the Code does not permit it to determine the just cause aspect of discipline.

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Résumé de Décision

PATRICK R. RIDGE, PLAIGNANT, ET
COMPAGNIE DE CHEMIN DE FER CANADIEN
PACIFIQUE, EMPLOYEUR.

Dossier du Conseil: 950-214

Décision n°: 934

Les présents motifs portent sur une plainte déposée en vertu du Code canadien du travail (Partie II - Sécurité et santé au travail). Le plaignant y allègue que l'employeur a violé l'article 147 en lui imposant une mesure disciplinaire parce qu'il avait exercé son droit de refuser d'effectuer du travail qui aurait pu l'exposer aux BPC.

La plainte a été rejetée. Dans les circonstances, le Conseil a jugé que le plaignant n'avait pas été discipliné parce qu'il avait exercé un droit que lui confère la Partie II du Code, mais parce qu'il avait refusé de se raser. Si le plaignant s'était rasé, il aurait pu être équipé d'un masque protecteur, suivant les directives de l'agent de sécurité. Dans les courts motifs qui suivent, le Conseil a insisté de nouveau sur le fait que son rôle limité aux termes de la Partie II du Code ne lui permet pas de juger si une mesure disciplinaire est justifiée.



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Reasons for decision

Patrick R. Ridge,
complainant,
and
Canadian Pacific Rail,
employer.

Board File: 950-214

The Board was composed of Vice-Chair Hugh R. Jamieson and Members Calvin B. Davis and Mary Rozenberg.

Appearances: (on record)

Mr. Denis Cross, for the complainant;
Ms. Marie Senécal-Tremblay and Mr. Marc Shannon, for the employer.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

These reasons deal with a complaint under Part II of the Canada Labour Code (Occupational Safety and Health) which was filed with the Board on November 13, 1991 by Mr. Patrick R. Ridge against Canadian Pacific Rail (CPR or the employer). Mr. Ridge alleged in his complaint that he had been disciplined by CPR because he exercised his right to refuse to work which is contrary to section 147 of the Code. The employer denied the allegations and, after attempts by an officer of the Board to assist the parties to settle the complaint had failed, the matter was heard at Winnipeg, Manitoba, on May 14, 1992.

Mr. Ridge is a long-term employee of CPR. At the time of the circumstances giving rise to the complaint he was working as a carman at the employer's Diesel/Car Shop at Brandon, Manitoba. Part of his job is to do "hot work" on rail cars that are coated with paint which contains PCB's. The degree of danger that this and other similar types of work exposes employees to has been an ongoing issue between CPR and the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (the CAW or the union), which represents carmen employed by CPR. Because of this concern, on September 25, 1991, Mr. Ridge refused to do hot work on rail cars.

Following an investigation into the refusal to work, Safety Officer Dwayne Laushway found that a condition did exist at the workplace that constitutes a danger to Mr. Ridge and issued a directive to CPR on September 30, 1991. This directive was later confirmed in writing on October 4, 1991:

"The undersigned Safety Officer, did on the 30th day of September 1990, attend at the workplace operated by C.P. Rail, being an employer subject to the Canada Labour Code II, at the Diesel/Car Shop, Assiniboine Avenue, Brandon, Manitoba and having conducted inquiries at the said workplace; consider that a condition exists in the said workplace which constitutes a danger to an employee while at work.

While at work Mr. Patrick Ridge was required to do hot work on rail cars coated with paint believed to be containing PCB's at levels less than 50 ppm. Mr. Ridge was not provided with properly fitted personal protective equipment (a respirator) nor did the training appear adequate to ensure proper use (contrary to COSH Reg. 12.2 and 12.15.2)

HEREBY DIRECTS the said employer pursuant to paragraph 145, 2, a, ii of the Canada Labour Code Part II to take measures immediately to protect any person from danger.

1. Provide Mr. Ridge with appropriate equipment suitably fitted for the task intended and designed to protect the person from the hazard for which it is provided.
2. Provide to the employee who uses this protective equipment instructions and training on the use and maintenance of the equipment.
3. Ensure that the work in question is not commenced until items 1 & 2 stipulated above are completed."

In compliance with the foregoing directive, CPR arranged for Mr. Ridge and another employee who was doing the same work to be properly fitted with and trained in the use of a respirator. However, because Mr. Ridge wore a beard, it was impossible to fit him. Apparently, for there to be a proper seal, the part of the face that is in contact with the respirator must be clean shaven. Mr. Ridge agreed, albeit reluctantly to shave off his beard. This he did and he reported for work clean shaven on October 3rd. The respirator fit was not done that day as Mr. Ridge and Mr. Douglas Mann, CPR's Mechanical Supervisor at Brandon, had to do work away from the shop on that date. This work did not involve hot work, therefore, no respirator was required.

On October 7th, 1991, after two days off, Mr. Ridge reported to work unshaven. When asked by Mr. Mann if he was going to shave so that the respirator fit could be done, he said he would let him know later. After lunch the same day, Ridge was approached again by Mann about shaving and he responded in the negative. When he later refused again on the third request, Mr. Ridge was placed out of service pending a disciplinary investigation. This investigation took place on October 11, 1991. As a result, Mr. Ridge was assessed 20

demerit points; however, he was allowed to return to work on October 14, 1991 provided he was clean shaven. It is this discipline and penalty that Mr. Ridge alleges is contrary to section 147 of the Code:

"147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

...

(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part;"

II

There was no issue here about the validity of Mr. Ridge's refusal or about the complaint being properly before the Board. CPR took no exception to the right of Mr. Ridge to refuse to work in the circumstances and the direction issued by the safety officer had not been appealed. In fact, the circumstances surrounding this whole affair were not really in dispute.

In this type of complaint, by virtue of section 133(6), a burden of proof is placed on any party that claims that the alleged contravention of the Code did not occur:

"133.(6) A complaint made pursuant to subsection (1) in respect of an alleged contravention of paragraph 147(a) by an employer is itself evidence that that contravention actually occurred and, if any party to the complaint proceedings alleges that the contravention did not occur, the burden of proof thereof is on that party."

It was the employer that so alleged in this case; therefore, it fell upon CPR to satisfy the Board that the discipline imposed on Mr. Ridge could not be considered in any way a reprisal because he exercised his right to refuse under the Code.

The employer approached this task by presenting Mr. Mann as a witness and made him available for questions from the CAW representative, Mr. Cross, who represented Mr. Ridge at the hearing. Mr. Mann was the management person directly involved in this situation. It was Mr. Mann who had been responsible to see that the safety officer's direction was complied with and it was he who held Mr. Ridge out of service when he refused to shave on October 7, 1991. It was also Mr. Mann who conducted the disciplinary interview with Mr. Ridge on October 11, 1991 and it was he who assessed the 20 demerit points.

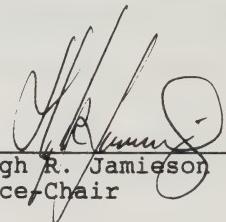
Having had the benefit of hearing Mr. Mann's evidence, as well as the evidence of Mr. Ridge and other witnesses who were called on his behalf, we can only reach the conclusion that the employer has discharged its onus in this matter as we are satisfied that Mr. Ridge was not disciplined because he exercised his right to refuse. He was disciplined because he refused to shave for the respirator fit on October 7, 1992 after being asked to do so repeatedly.

Whether that discipline was justified or excessive is not a matter for this Board to determine. Perhaps in another forum, some of the points made by Mr. Ridge about his uncertainty and confusion on that day might have reached more sympathetic ears. However, our role

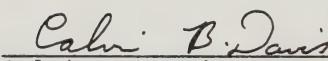
in this type of complaint is limited to detecting violations of section 147 of Part II of the Code, it is not to decide the just cause aspect of the discipline.

While there can be little question that the discipline levied against Mr. Ridge was remotely connected to his refusal in that it was a consequential part of the events that flowed therefrom, we cannot find in the circumstances that CPR violated the Code.

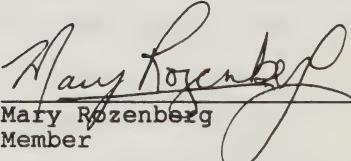
The foregoing is a unanimous decision of the Board.



Hugh R. Jamieson
Vice-Chair



Calvin B. Davis
Member



Mary Rozenberg
Member

DATED at Ottawa this 28th day of May, 1992.

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SUMMARY

HUGUETTE GAUTHIER,
COMPLAINANT AND EXECUTIVE
SECURITY SERVICES LTD.,
EMPLOYER.

Board File: 745-4197

Decision No.: 935

These reasons deal with a complaint filed pursuant to section 97 of the Canada Labour Code (Part I - Industrial Relations). The complainant alleged that the employer had violated section 94 by disciplining her for having engaged in union activities.

The complaint was dismissed. The Board found that the disciplinary actions were not motivated by anti-union animus. The lack of relationship between the union activities and the disciplinary actions constitutes in this case a determining factor.

RÉSUMÉ

HUGUETTE GAUTHIER,
PLAIGNANTE, ET SERVICES DE
SÉCURITÉ EXECUTIVE LTÉE,
EMPLOYEUR.

Dossier du Conseil: 745-4197

Décision n°: 935

Les présents motifs portent sur une plainte déposée en vertu de l'article 97 du Code canadien du travail (Partie I - Relations du travail). La plaignante y allègue que l'employeur a violé l'article 94 en lui imposant des mesures disciplinaires parce qu'elle avait exercé des activités syndicales.

La plainte est rejetée. Le Conseil conclut que les mesures disciplinaires imposées à la plaignante ne procèdent pas d'un dessein anti-syndical. L'absence de concordance entre les activités syndicales et les mesures disciplinaires constitue en l'espèce un facteur déterminant.



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Canada
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Board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

Huguette Gauthier,
complainant,
and
Executive Security
Services Ltd.,
employer.

Board File: 745-4197

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Ms. Mary Rozenberg and Ms. Ginette Gosselin, Members.

Appearances

Mr. Paul Venne, for the employer;
Ms. Huguette Gauthier, on her own behalf.

These reasons for decision were written by Ms. Ginette Gosselin, Member.

I

This decision deals with a complaint filed with the Board on March 30, 1992. The complainant, a supervisor employed by Executive Security Services Ltd., alleges that her employer disciplined her, contrary to section 94 of the Code.

Ms. Gauthier was suspended for five days on February 17, 1992 and for two weeks on March 23, 1992. Earlier, in January, she had received two disciplinary notices. The complainant alleges that all these measures result from her union activities.

In its reply, the employer states that these disciplinary measures were justified because of the indifference and negligence displayed by Ms. Gauthier in performing her duties. While acknowledging that the complainant had

performed union duties, the employer nevertheless insisted that there was no connection between these duties and the disciplinary measures.

A hearing was held in Montréal on May 1, 1992.

Ms. Gauthier has been employed by Executive Security Services Ltd. (Executive) at Mirabel Airport since May 1, 1989. She used to perform the same duties for Aéroguard, for whom she began working in August 1988. As a supervisor, Ms. Gauthier ensures that all passenger screening points are open on time and that the security guards are at their posts. She co-ordinates the guards' breaks and notes, as required, their late arrival for and absence from work. She also responds to unforeseen needs of the airlines, as they arise. Most of these duties require her to complete forms that are then used by Executive for accounting or disciplinary purposes.

Ms. Gauthier's union activities are not contested. She began serving as a steward in November 1990, as soon as the Board certified the Union des agents de sécurité de Québec, Local 8922 of the United Steelworkers of America. She occupied this position until the members of the bargaining unit decided on November 19, 1991 to ask the Board to decertify the union. In the meantime, she had taken part in bargaining sessions with the employer with a view to concluding a first collective agreement. In this capacity, she replaced the other steward, Said Taleb, who was on holidays at the time.

These very brief negotiations, held in the summer of 1991, produced an agreement in principle between the parties. This agreement also included the settlement of a complaint

filed by the union against changes to hours of work. Ms. Gauthier recommended acceptance of the agreement at a general meeting. The supervisors rejected the whole package, i.e., both the agreement in principle on the collective agreement and the proposed settlement of the complaint. At a subsequent meeting, the supervisors decided to seek decertification of the union, whereupon the complainant's union activities ended.

Ms. Gauthier testified that in addition to being subjected to the disciplinary measures at issue here, she was dismissed from her job in the summer of 1990, during the union organizing campaign. A complaint was filed with the Board at the time. This complaint was withdrawn after the employer and the union agreed on the terms and conditions of Ms. Gauthier's reinstatement in her duties on November 10, 1990. Ms. Gauthier was also suspended on November 29, 1991 during an investigation by the employer of the frequent disappearance of items inadvertently left by passengers in the containers in which they place the contents of their pockets at the screening points. She resumed work on January 8, 1992. The investigation is still going on. Ms. Gauthier did not contest this particular suspension before the Board.

On January 13, 1992, shortly after she resumed work, she received a written reprimand for incorrectly completing a claim form that was to be submitted to an airline. She received another written reprimand on January 21 for allegedly making the same errors. In both cases, her superior, Pierre Gauthier, informed her that he was prepared to meet with her to answer any questions she had concerning her duties and warned her that he would have to take harsher measures if she did not mend her ways.

The complainant made other similar errors. She was first suspended on February 17, 1992, for five days. She was suspended again on March 23, 1992, this time for two weeks.

Ms. Gauthier's errors or omissions resulted in either financial losses for Executive or the filing of grievances by security guards who were not receiving the pay to which they were entitled when their hours of work were not reported correctly by the complainant on the appropriate forms.

During his testimony, Pierre Gauthier, operations manager for Executive at Mirabel, discussed his reasons for disciplining the complainant. He explained that when he began working at Mirabel in February 1991, Executive was experiencing problems. There were problems with supervision, and 117 grievances filed by the security guards' union were outstanding. Approximately 60% of these grievances concerned pay errors. His predecessor and the guards were at war. He worked tirelessly to improve relations between the guards and management, introduced a system to control hours of work, produced seniority lists on a regular basis and developed supervision procedures. It was the repeated errors made by the complainant in applying these measures that obliged him to take strong action against her. The complainant had already received three written reprimands, in February and April 1991, for similar errors. According to Pierre Gauthier, the measures that are the subject of this complaint were part of the normal disciplinary process.

Arguments of the Parties

The complainant argued that the four disciplinary measures at issue here were typical of other measures to which her and her union had been subjected earlier, namely, her dismissal during the union organizing campaign and the changes made to the supervisors' working conditions shortly after certification. The fact, she argued, that she was the only one subjected to such measures clearly indicated that the employer, having gotten rid of the union, now wanted to dismiss her.

The employer strongly denied that these were its motives. The facts submitted in evidence at the hearing, it argued, clearly substantiated its denial. Despite repeated warnings, Ms. Gauthier did not improve her work performance and it was normal for the employer to take measures after warning her. Moreover, the complainant had stopped performing all union duties a number of months prior to her suspension in February 1992, and when she was first suspended in November 1991, she did not cite her union activities as the reason. The employer also pointed out that no such disciplinary measures were taken against the other steward. Finally, it added that it would have no reason to complain of Ms. Gauthier's union activities, because she had recommended at the general meeting of her union that it accept the agreement in principle on the collective agreement and the proposed settlement of the complaint.

The relevant provisions of the Code read as follows:

"94. (3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,

...

97.(1) Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that

(a) an employer, a person acting on behalf of an employer, a trade union, a person acting on behalf of a trade union or an employee has contravened or failed to comply with subsection 24(4) or 34(6) or section 37, 50, 69, 94 or 95; or

...

98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party."

The employer must therefore show that it did not discipline Ms. Gauthier for her past union activities. The many past Board decisions in this type of case are consistent: the Board will not attempt to determine whether the employer had just cause to impose such measures; it will attempt instead to determine whether this "just cause," when invoked, is accompanied by or disguises anti-union animus (see in this regard, *inter alia*, National Pagette (1991), as yet unreported CLRB decision no. 862; Pierre Fiset (1985), 55 di 233; and 85 CLLC 16,041 (CLRB no. 473); Yellowknife District Hospital Society et al. (1977), 20 di 281; and 77 CLLC 16,083 (CLRB no. 82)).

To make this determination, the Board takes a number of factors into consideration. The coincidence of union activities and disciplinary measures is probably the most familiar of these factors. The disciplinary record of complainants and the employer's normal behaviour in matters of discipline are other factors (Rigaud Transport Inc. (1986), 68 di 89 (CLRB no. 605); Allcap Baggage Services Inc. (1989), 78 di 13 (CLRB no. 744)).

In the instant case, the Board concludes that the employer discharged its burden of proof and that it proved to us that the measures taken were not motivated by anti-union animus.

The employer repeatedly told the complainant that it was dissatisfied with her work and that disciplinary measures would be taken if she did not mend her ways. It thus appears to us in this regard that the employer merely applied progressively the process it had announced. It is not up to the Board to pass judgment on the validity or severity of this process. The fact that Ms. Gauthier had not been performing any union activities for more than two months and that she did not in the meantime attribute the first suspension imposed on her to her union activities confirms our first conclusion. While it is true that Ms. Gauthier and the supervisors' union had their share of problems around the time of certification, it is also true that the employer's representatives have since changed, as has the work atmosphere.

As the Board stated earlier, it therefore appears to us rather that Ms. Gauthier's current problems do not stem from her past union activities, but are more in the nature of the

problems that can be resolved using the mechanisms provided for in collective agreements or in Part III of the Code, as the case may be.

For these reasons, the complaint is dismissed.

This is a unanimous decision.

Louise Doyon
Louise Doyon
Vice-Chair

Mary Rosenberg
Mary Rosenberg
Member

G. Gosselin
Ginette Gosselin
Member

ISSUED at Ottawa, this 3rd day of June 1992.

CCRT/CLRB - 935

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RÉSUMÉ

ANNE-MARIE RAINVILLE PLAIGNANTE,
SYNDICAT DES EMPLOYÉS DE CJMS,
SECTION LOCALE 2829 DU SYNDICAT
CANADIEN DE LA FONCTION PUBLIQUE,
INTIMÉ, ET RADIOMUTUEL INC.,
(DIVISION CJMS), EMPLOYEUR.

Dossier du Conseil: 745-4090

Décision no: 936

Le Conseil a rejeté la plainte
présentée en vertu de l'article
37 du Code canadien du travail.

Le Conseil a considéré que le
syndicat n'avait pas contrevenu
à ses obligations lorsqu'il a
refusé de présenter un grief
contestant la confection des
horaires de travail des
journalistes auxiliaires,
notamment de ceux de la
plaignante.

Le Conseil a toutefois noté que
c'est grâce à l'intervention de
la conseillère syndicale que le
syndicat a, en fin de compte,
respecté ses obligations du
devoir de représentation juste.

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purposes.

SUMMARY

ANNE-MARIE RAINVILLE,
COMPLAINANT, SYNDICAT DES
EMPLOYÉS DE CJMS, LOCAL 2829,
CANADIAN UNION OF PUBLIC
EMPLOYEES, RESPONDENT, AND
RADIOMUTUEL INC. (CJMS
DIVISION), EMPLOYER.

Board File: 745-4090

Decision no.: 936

The Board dismissed the
complaint filed pursuant to
section 37 of the Canada
Labour Code.

The Board considers that the
union did not breach its duty
when it refused to file a
grievance concerning the
manner in which the work
schedules of auxiliary
journalists, including the
complainant, were established.

The Board noted however that
it is because the union
adviser intervened in the
matter that the union
ultimately fulfilled its duty
of fair representation.

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Canadien des
Relations du
Travail

Reasons for decision

Anne-Marie Rainville,
complainant,
and

Syndicat des employés de
CJMS, Local 2829, Canadian
Union of Public Employees,
respondent,
Radiomutuel Inc. (CJMS
Division),
employer.

Board File: 745-4090

The Board was composed of Ms. Louise Doyon, Vice-Chair, and
Messrs. J. Jacques Alary and François Bastien, Members.

Appearances

Ms. Anne-Marie Rainville, complainant, accompanied by
Messrs. Robert De Serres and Jacques Rainville;
Mr. Jacques Lamoureux, accompanied by Mr. Christian Richard,
president, for the union; and
Mr. Donald Archambault, accompanied by Mr. Philippe
Châtillon, for the employer.

These reasons for decision were written by Ms. Louise Doyon,
Vice-Chair.

On November 22, 1991, the Board received a complaint filed
pursuant to section 37 by Anne-Marie Rainville (the
complainant). Ms. Rainville alleges that her union did not
represent her in accordance with section 37 of the Code,
which reads as follows:

"37. A trade union or representative of a trade
union that is the bargaining agent for a
bargaining unit shall not act in a manner that is
arbitrary, discriminatory or in bad faith in the
representation of any of the employees in the
unit with respect to their rights under the
collective agreement that is applicable to them."

Ms. Rainville has worked for Radiomutuel Inc. (CJMS Division) (the employer) since December 1, 1989. She began as a receptionist and reader of weather bulletins in the radio-traffic section. In early June 1990, Ms. Rainville became an auxiliary reporter in the News Department.

Auxiliary reporters perform duties identical with those of regular reporters, but they work shorter hours. The collective agreement defines the position of auxiliary reporter as follows:

"12.04.1 An auxiliary employee works a total of two days a week or less or is used on an intermittent or irregular basis to replace a regular employee in the following situations: during weekly days off, on weekends, on designated paid holidays, and during annual vacations, sick leave or any other absences provided for in the agreement."

(translation)

Each week, the director of information sets the hours of work of the auxiliary reporters. The collective agreement does not specifically provide for assignment to a regular work schedule or a set number of hours. The information director has considerable discretion in this regard and determines the allocation of hours of work based on operational requirements.

The incident that gave rise to this complaint is as follows. On June 24, 1991, at the end of her shift, the complainant notified the director of information, Philippe Châtillon, in writing that she would be absent on the night of June 25 to 26, 1991 for reasons that need not be related here. Ms. Rainville had told her superior at the time that she had made arrangements with at least one other auxiliary reporter to replace her during her absence. She did not in fact report for work on the night of June 26, 1991. Mr. Châtillon saw Ms. Rainville's notice on the morning of June

25 when he arrived at work. He immediately informed Christian Richard, union president and a newsman-reporter, of its contents. Mr. Châtillon felt that Ms. Rainville had not followed the chain of command and that altering the work schedule in this manner could have detrimental consequences.

On June 29, 1991, the complainant telephoned the union president to inform him that, according to the hours of work established for the weeks of July 1 and July 8, she was assigned only two shifts, which was well below her usual number of assignments. She then told Mr. Richard that, in her opinion, the decision to assign her only 13 hours a week for this period constituted disciplinary action arising from her absence on the night of June 25 to 26, 1991. That is when Mr. Richard told the complainant of his conversation of June 25 with Mr. Châtillon, and that, in his opinion, she had acted in an improper manner because she should not "go over the head" of her superior. According to Ms. Rainville, the union president did not want to consider the possibility that her work assignments for these two weeks constituted disciplinary action or to treat them as such.

The union president confirmed this conversation. On July 3, 1991, at the end of her night shift, Ms. Rainville met with Mr. Richard on the work premises and again related to him her version of the facts and her view that the attitude of the director of information constituted disciplinary action that warranted the union's intervention, to which Mr. Richard said that she could count herself lucky to have worked so many hours since she began her duties in June 1990, i.e., an average of 25 hours a week. Moreover, the discretion exercised by the employer in determining hours of work could, according to him, neither be challenged nor considered punishment. The union president explained that he had already checked with Mr. Châtillon to ensure that the

reduction in Ms. Rainville's hours of work did not constitute disciplinary action.

On July 8, 1991, Ms. Rainville wrote to Mr. Richard, with copies of her letter to the other members of the union executive. In this letter, she described the events that had taken place since June 26 and again requested the union to intervene by asking the employer to put an end to what she termed unwarranted disciplinary action. At the hearing, the complainant gave reasons for her request, i.e., that the employer did not have the right to exercise its discretion in an abusive or discriminatory manner when setting hours of work. She was not claiming more hours, but objected to the employer's assigning more hours to more junior reporters.

The union president was on holiday at the time and did not reply immediately to the July 8 letter. During the week of July 22, Ms. Rainville spoke with the union vice-president, Paul Larocque, to explain her understanding of the situation that had existed since July 1. Mr. Larocque reiterated the view that she had not followed the normal procedure, which was wrong, and that he really did not know what could be done.

Ms. Rainville informed Mr. Larocque that she intended to contact Micheline Bourassa, the union adviser for the Canadian Union of Public Employees, concerning the matter. After some hesitation, Mr. Larocque gave his blessing to this initiative because he himself seemed unable to respond to Ms. Rainville's request.

On August 5, 1991, Ms. Rainville met with Ms. Bourassa and explained the situation. Ms. Bourassa felt that something could probably be done and that she would investigate the matter. However, not until October 22, 1991 did a meeting finally take place between Ms. Bourassa, Ms. Diane

Baillargeon, the union secretary-treasurer, Ms. Rainville and, for a short time, Mr. Christian Richard. Prior to this meeting, Messrs. Richard and Larocque, who were responsible for processing grievances and applying the collective agreement, had decided to withdraw from Ms. Rainville's case. Their reason for doing so, it appears, was that being reporters themselves in the newsroom, the handling of this case would be easier for people who did not work in this department. This unusual procedure was in fact the result of a personality conflict between Mr. Richard and Ms. Rainville.

At the meeting on October 22, 1991, Ms. Rainville related her version of the facts to Ms. Bourassa and Ms. Baillargeon. Specifically, she provided the weekly statement of her hours of work since June 11, 1990 and an assessment of the financial losses she had incurred since her hours of work were first reduced in July 1991. Ms. Bourassa later asked the union for information on the setting of hours of work and on the number of hours worked by the auxiliary reporters since July 1, 1991. The union president, having obtained the information from the employer, prepared a list of the actual hours worked, between July 1, 1991 and October 6, 1991, by each auxiliary reporter, including the complainant.

On November 4, 1991, Ms. Bourassa and Ms. Baillargeon met to examine the information provided by Ms. Rainville and the union. It was decided that the provisions of the collective agreement, in particular those dealing with the status of an auxiliary reporter and hours of work, did not allow recourse to the grievance procedure. This decision was communicated to Ms. Rainville on November 11, 1991 at a meeting with Ms. Baillargeon and Ms. Bourassa. During her testimony, Ms. Bourassa explained that after comparing the number of hours worked by all auxiliary reporters since July 1, 1991,

she became convinced that there was nothing to grieve, in view of the discretion given to the employer in setting hours of work and the apparently equitable assignment of hours of work among the auxiliary reporters since July 1, 1991. Under the collective agreement, a grievance had to be filed within 21 days following the date on which the employee first became aware of the incident giving rise to the grievance. Notwithstanding the time that elapsed between July 1 and October 22, Ms. Bourassa felt strongly that meeting the deadline for filing a grievance had never been a problem with this employer. The apparent expiration of the 21-day time limit in this case did not influence the union as filing a grievance in October or November would not have posed a problem.

The information director, Mr. Châtillon, explained, for his part, that the weekly preparation of the auxiliary reporters' hours of work had to be done in accordance with not only the provisions of the collective agreement but also programming needs. In this regard, he exercised his discretion in slotting the reporters, taking into account the experience and competence of the employee and the company's needs. He added that he met with Ms. Rainville at the end of May and at the beginning of June 1991 to inform her that her work performance was unsatisfactory and that he therefore planned to reduce her hours of work. This evidence was not contradicted by Ms. Rainville.

Decision

When the Board deals with a section 37 complaint, it does not have to examine the merit of the employee's claim, nor does it have to judge the manner in which the union interprets the provisions of the collective agreement. Its obligation is rather to focus on the union's conduct and attitude in examining the matter. To this end, it

determines whether the union conducted a full and serious investigation, consulting both the employee and the other persons concerned, whether it treated the employee concerned cavalierly or differently, and whether it examined all allegations made, having regard to the provisions of the collective agreement. In Lionel Arseneault (1988), 74 di 63 (CLRB no. 692), the Board had the following to say:

"As the Board held in numerous cases (Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304); André Cloutier (1981), 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16,108 (CLRB no. 319); Jacqueline Brideau [(1986), 63 di 215; 12 CLRBR (NS) 245; and 86 CLLC 16,012 (CLRB no. 550)]; Messrs. Robert Lacoste and Marcel Leduc (1988), 73 di 160; and 89 CLLC 16,001 (CLRB no. 680)), it must focus principally on the attitude and behaviour of the union and its officers in examining, analysing and processing a grievance. The union remains the body legally responsible for all the employees in a bargaining unit. It must act honestly, with an acute sense of responsibility, being careful not to display an attitude that is in bad faith, arbitrary or discriminatory. This is how the duty of fair representation is defined."

(page 67)

Later in its reasons, the Board added this:

"In fact, the Board has repeatedly stated its belief that, during the presentation of evidence relating to section 136.1 complaints, it would not go into the details of the facts and circumstances that gave rise to the grievance. It thus refused to embark on an examination of the substance and merits of the grievances, except to determine the setting, background and atmosphere as well as the circumstances that gave rise to the complaint. As the Board often has to repeat, the only aspect of interest is the union's conduct and attitude in studying, analysing and processing the grievance. . ."

(page 68)

In this case, the Board did not form a very favorable impression of the attitude displayed by the union president when, on June 29 and July 3, the complainant told him that the reduction in her hours of work might constitute, in her opinion, a form of penalty or punishment.

The union president did not pay very close attention to Ms. Rainville's allegations at the time. Although he stated that he checked with the employer that the apparent differences in Ms. Rainville's hours of work did not constitute disciplinary action, this does not excuse his indifference and the fact that he did not bother to examine in detail, with the complainant, the basis of her claim. Ms. Rainville, for her part, informed all members of the union executive of the situation, which she considered improper and contrary to the provisions of the collective agreement. She thus fulfilled her obligation to give the union her version of the facts.

The involvement of the union adviser, Micheline Bourassa, and the steps she took to examine more thoroughly Ms. Rainville's allegations indicate a conduct that is in keeping with the obligations under section 37. What these facts reveal is that despite its initial failing, the union did ultimately fulfil its duty of fair representation. Ms. Bourassa's testimony concerning the practice relating to the time limits for filing a grievance is a factor that the Board took into consideration.

The Board does not have to judge whether the union's decision not to act on the complainant's request that a grievance be filed on the strength of her claims was appropriate. It can only note that the union's decision was made after examining the information it had available to it, information from both the employer and the complainant herself, and after forming the view that there had been no contravention of the provisions of the collective agreement in assigning hours of work to the auxiliary reporters during the period in question.

During the hearing, the Board denied the employer the right to cross-examine the witnesses concerning facts related to

the propriety of the employer's conduct, which conduct the complainant specifically criticized the union for not contesting. More particularly, the employer wanted to ask the complainant questions about her work experience. Counsel for the employer asked the Board to explain, in its reasons, the basis for that particular decision.

The Board has had the opportunity, in its past decisions, to explain its understanding of the employer's role in section 37 complaints and to clarify the nature of its participation in such a proceeding.

In André Gagnon (1986), 63 di 194 (CLRB no. 547), the Board summarized the situation as follows:

"It is Board practice, in the name of minimum fair play toward the complainant, to ask the employer to keep a very low profile in cases involving a contravention of section 136.1, at least with respect to the merits of the complaint. On the other hand, it will be asked to come to the fore in the matter of remedies that will counteract the negative consequences of such an unfair labour practice, if the Board were to grant such relief."

(page 206)

In Gordon Newell (1987), 69 di 119 (CLRB no. 623), the Board again addressed this question in these terms:

"At the beginning of the hearing, the parties were also reminded that Air Canada, as the employer, was not on trial in a section 136.1 proceeding. The Board had some difficulty in convincing Air Canada's counsel of this fact. The Board tried to make it clear that Air Canada was present at the hearing largely as an observer and basically because, if the Board found merit in the complaint, the remedy ordered by the Board would probably, in the final analysis, impact on the employer, as well as on the union. Fairness demanded that the employer be in a position to make submissions at least concerning the issue of remedy."

(page 123)

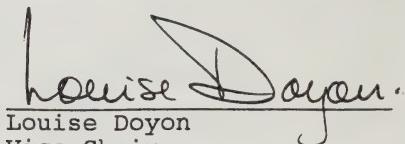
See also on this issue Vincent Maffei (1979), 37 di 102; [1980] 1 Can LRBR 90; and 79 CLLC 16,202 (CLRB no. 218); and

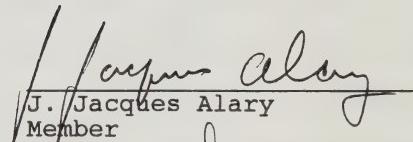
Robert Hogan (1981), 45 di 43; [1981] 2 Can LRBR 389; and 81 CLLC 16,132 (CLRB no. 324).

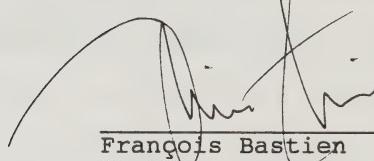
The Board's decision not to allow the employer to intervene on the merit of a complaint directed against the bargaining agent is based on these established principles.

For all these reasons, the complaint is dismissed.

This is a unanimous decision.


Louise Doyon
Vice-Chair


J. Jacques Alary
Member


Francois Bastien
Member

ISSUED at Ottawa, this 12th day of June 1992.

CCRT/CLRB - 936

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SUMMARY

NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW - CANADA), APPLICANT, CANADIAN ASSOCIATION OF INDUSTRIAL, MECHANICAL AND ALLIED WORKERS, LOCAL 14, CERTIFIED BARGAINING AGENT, ARROW TRANSPORTATION SYSTEMS INC. AND ARROW MINING SERVICES INC., EMPLOYERS, AND TEAMSTERS LOCAL UNION NO. 213, INTERVENOR.

Board File: 560-277

Decision no. 937

This case deals with an application seeking a single employer declaration under section 35 of the Canada Labour Code (Part I - Industrial Relations). The two employers involved recognize they have common control and direction, but deny being both under federal jurisdiction. The application was dismissed for lack of constitutional jurisdiction.

Arrow Transportation Systems Inc. (ATSI) and Arrow Mining Services Inc. (Mining) are sister companies.

Mining provides ore hauling services to the mining industry within the boundaries of British Columbia. Its employees are represented by the Teamsters, which hold a provincial certification.

ATSI is primarily involved in extraprovincial trucking. Its employees are represented by CAW - Canada, which holds a federal certification.

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RÉSUMÉ

SYNDICAT NATIONAL DES TRAVAILLEURS ET TRAVAILLEUSES DE L'AUTOMOBILE, DE L'AÉROSPATIALE ET DE L'OUTILLAGE AGRICOLE (TCA - CANADA), REQUÉRANT, ASSOCIATION CANADIENNE DES TRAVAILLEURS INDUSTRIELS, MÉCANIQUES ET ASSIMILÉS SECTION LOCALE 14, AGENT NÉGOCIATEUR ACCRÉDITÉ, ARROW TRANSPORTATION SYSTEMS INC. ET ARROW MINING SERVICES INC., EMPLOYEURS, ET SECTION LOCALE 213 DU SYNDICAT DES TEAMSTERS, INTERVENANTE.

Dossier du Conseil: 560-277

Décision no 937

L'affaire porte sur une demande visant à obtenir une déclaration d'employeur unique, présentée en vertu de l'article 35 du Code canadien du travail (Partie I - Relations du travail). Les deux employeurs visés admettent qu'ils assurent en commun le contrôle et la direction des entreprises, mais nient qu'ils relèvent tous deux de la compétence fédérale. Le Conseil a rejeté la demande parce qu'il n'est pas compétent au plan constitutionnel.

Arrow Transportation Systems Inc. (ATSI) et Arrow Mining Services Inc. (Mining) sont des compagnies soeurs.

Mining assure des services de transport de minerai pour le secteur minier dans la province de la Colombie-Britannique. Ses employés sont représentés par les Teamsters, qui détiennent une accréditation provinciale de Colombie-Britannique.

ATSI oeuvre principalement dans le secteur du camionnage extraprovincial. Ses employés sont représentés par TCA - Canada, qui détiennent une accréditation fédérale.

Mining is now performing an ore hauling contract that was once tendered to ATSI until 1987, when it was lost to a third unrelated federal company. Mining got the contract after new bids in 1991. CAW - Canada alleges this constitutes an illegal transfer of business.

After having reviewed the evidence, the Board found that ATSI and Mining are indeed two distinct undertakings for constitutional purposes. A single employer declaration cannot be made unless at least two associated federal businesses are under common control. The application was therefore dismissed.

Mining exécute maintenant un contrat de transport de minerai, qui avait été attribué à ATSI jusqu'en 1987, lorsqu'une autre entreprise fédérale non associée l'a décroché. Mining a obtenu le contrat au moment d'appels d'offres en 1991. TCA - Canada allègue que cette mesure constitue un transfert illégal d'entreprise.

Après avoir examiné la preuve, le Conseil a jugé que ATSI et Mining étaient en fait deux entreprises distinctes aux fins de la compétence constitutionnelle. Une déclaration d'employeur unique ne peut être faite que si deux entreprises fédérales associées assurent en commun le contrôle de ces entreprises. La demande a donc été rejetée.

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Reasons for decision

National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada),

applicant,

and

Canadian Association of Industrial, Mechanical and Allied Workers, Local 14,

certified bargaining agent,

and

Arrow Transportation Systems Inc. and Arrow Mining Services Inc.,

employers,

and

Teamsters Local Union No. 213,

intervenor.

Board File: 560-277

The Board was composed of Mr. Serge Brault, Vice-Chairman, and Messrs. J. Jacques Alary and Michael Eayrs, Members.

Appearances on Record

Mr. John Bowman, for National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada);

Mr. Peter Sheen, for Arrow Transportation Systems Inc. and Arrow Mining Services Inc.; and

Mr. David B. Stevenson, for Teamsters Local Union No. 213.

These reasons for decision were written by Mr. Serge Brault, Vice-Chairman.

The Application

This case deals with application filed pursuant to section 35 of the Canada Labour Code (Part I - Industrial Relations) with the Canada Labour Relations Board on February 13, 1992. The application was originally filed by the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada) on behalf of the Canadian Association of Industrial, Mechanical and Allied Workers, Local 14 (CAIMAW), which at the time of filing was the certified bargaining agent for a unit of vehicle repair and maintenance employees of Arrow Transportation Systems Inc. (ATSI).

The Board has since granted an application filed pursuant to section 43 of the Code seeking a declaration that CAW - Canada is the successor to CAIMAW for the aforesaid unit of ATSI employees (file no. 580-130).

The applicant seeks to have the Board declare that ATSI and Arrow Mining Services Inc. (MINING) are a single employer for purposes of the Code and that the collective agreement covering ATSI employees doing mechanical work is also binding on MINING employees who carry out similar work.

MINING employees, except office and sales staff, are currently represented under a provincial (British Columbia) certification order and a collective agreement by Teamsters Local Union No. 213 (the Teamsters), an intervenor in these proceedings.

Section 35 of the Code reads as follows:

"35. Where, in the opinion of the Board, associated or related federal works, undertakings or businesses are operated by two or more employers having common control or direction, the Board may, after affording to the employers a reasonable opportunity to make representations, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business."

This application was thoroughly investigated by the Board as appears from the report filed by the Board's investigating officer. Given the evidence on record, and since no party involved requested a hearing, this matter was decided *in camera* on the basis of the officer's report and the parties' submissions.

II

The Evidence

General Nature of the Companies Involved

ATSI is involved in the business of extraprovincial trucking. Its present operations consist primarily in hauling containers between Vancouver, B.C., and Seattle/Tacoma, Washington, which activity is carried out on a regular and continuous basis. In addition to its container hauling activity, this employer was, in the past, also involved in ore hauling within the province of British Columbia. It carried out ore hauling for the now defunct Cassiar Mine located in northern B.C. and for the Princeton (Similco) mine located in southwestern B.C., until it lost the contract in or about 1987.

MINING is involved in the business of intraprovincial ore hauling for the Princeton (Similkameen) Mining Company. It both supplies the heavy equipment (ore hauling trucks) and carries out the ore hauling from the Princeton (Similco) mine near Princeton, B.C., to dockside in North Vancouver. Princeton is located approximately 180 miles east of Vancouver. This employer does not operate outside the boundaries of the province nor does it hold any operating authorities of its own.

The corporate head office address for both employers affected by this application is one and the same. Both share common directors and officers, although each has its own separate business operating address, located approximately 45 miles apart from one another.

The chief executive officer for both employers is David Brown, President and General Manager. He works out of a third location, the corporate head office in North Vancouver.

Finance and Accounting

The finance and accounting functions for both ATSI and MINING are carried out by office staff employed directly by ATSI from the premises at 320 Seymour Blvd., North Vancouver, B.C., which serves as the corporate headquarters for both employers.

Each employer utilizes its own separate letterhead, invoice forms and payroll cheques.

Both employers bank at the same financial institution, namely, The Royal Bank of Canada, Main Branch, in Vancouver, B.C.

Labour Relations Matters

With regard to labour relations matters, ATSI employees engaged in vehicle repair and maintenance (mechanics) are covered under a certification order issued by this Board on November 5, 1980. This group is currently subject to a collective agreement between ATSI and CAIMAW.

In addition to the above, the drivers employed by ATSI are also subject to a federal certification order held by the General Truck Drivers and Helpers Local Union No. 31 and to a collective agreement between that union and the employer.

In contrast, all MINING employees, except office and sales staff, are covered under a provincial (British Columbia) certification order. MINING employees (drivers and mechanics) are also subject to a collective agreement between MINING and the Teamsters.

Terms and Conditions of Employment

The terms and conditions of employment of ATSI and MINING employees who are affected by this application are governed by different collective agreements, which the Board was able to review.

Supervision

As set out in the organization charts submitted for ATSI and MINING, the day-to-day supervision of employees of each employer is carried out by the respective management for each company. There is no interchange of supervision between the two employers. The managers for ATSI and for MINING both report to the President and General Manager, David Brown.

Interchange of Work and of Employees

The employers advise that there is no interchange of work or of employees between ATSI and MINING. The only caveat to this is provided in a letter of March 4, 1992 from counsel for the employers. Counsel explains that mechanic Ernie Fazakas, now employed by MINING, was formerly employed by ATSI, both as a mechanic and as a driver. However, he and the drivers currently employed by MINING were hired afresh by MINING.

Representation in Industrial Relations Matters

Both employers are represented at the bargaining table by the same independent labour relations consultant.

Each company has a divisional manager in charge of hiring, firing and grievance administration.

Registration of Ore Hauling Trucks Operated by MINING

The four ore hauling trucks (tractor units) operated by MINING are leased by and registered in the name of Arrow Transportation Systems Inc. The Board's officer reported that he had been advised by counsel for the employers that the lease payments, as well as the operating expenses of these vehicles, were made by MINING. This form of arrangement between ATSI and MINING also exists between ATSI and other members of the Arrow family of companies, both in Canada and in the United States.

Buildings, Equipment and Telephone Listings for ATSI and MINING

ATSI owns the corporate premises in North Vancouver for both ATSI and MINING and the facilities on Mitchell Road in Richmond, B.C., which serves as ATSI's business operating address. It also counts among its assets a fleet of vehicles (trucks) and a variety of mechanical tools used to service and maintain the fleet.

MINING operates from leased premises in Abbotsford, B.C. It counts among its assets and equipment the ore hauling trucks used to fulfill its ore hauling contract with Princeton Mining Company, a half-ton pickup truck, shop tools used to service/maintain the ore hauling trucks, and an ACTO trailer, which serves as a lunchroom facility for MINING employees.

ATSI alone is listed in both the white and yellow pages of the Vancouver Telephone Directory.

III

Position of the Parties

Position of the Applicant

The applicant seeks a declaration from the Board pursuant to section 35 of the Code that ATSI and MINING are a single employer for purposes of the Code and that the collective agreement between ATSI and CAIMAW is binding on MINING employees who carry out vehicle maintenance and repair work for that employer.

The applicant points out that prior to 1987, when ATSI held the ore hauling contract with the Princeton Mining Company, a contract similar to the one now being held by MINING, the vehicle maintenance and repair work on the ore hauling trucks was carried out by members of CAIMAW bargaining unit. The applicant contends that the criteria for the finding of single employer are present in this case. Notably, the applicant takes the position that work currently performed by the mechanic employed by MINING comes under federal jurisdiction, as it is work that was previously carried out by members of the CAIMAW bargaining unit employed by ATSI.

The applicant alleges that ATSI has used MINING as a vehicle for escaping its collective agreement obligation with CAIMAW. In their view, ATSI has effectively transferred work previously carried out under the CAIMAW collective agreement to MINING in order to have the same work performed at a lower rate of pay. This, says the applicant, is precisely what section 35 of the Code is intended to prevent.

Position of the Employers

The employers do not dispute the fact that they are under common control and direction.

The employers oppose this application on two grounds.

- (1) The operations of MINING, a provincial undertaking, fall outside the scope of the Canada Labour Code (Part I), and the Board therefore has no jurisdiction to grant the requested declaration.

- (2) In the alternative to the Board finding that it has jurisdiction over the operations of both employers, the Board should decline to issue the requested declaration, as there is no labour relations purpose in doing so. In this regard, the employers point out that MINING employees are presently represented by a freely chosen bargaining agent, the Teamsters, and are subject to a freely negotiated collective agreement.

In their reply to this application, the employers comment on the loss of the ore hauling contract by ATSI and the subsequent acquisition of this contract years later by MINING. In the interim, this ore hauling contract was won by another company, Intermountain Transport Ltd., a federal employer. The employers emphasize that CAIMAW made no effort at the time to exert any successorship rights in that company despite its federal nature.

Position of the Intervenor

The Teamsters also oppose this application on the same two grounds advanced by the employers.

- (1) The Board has no jurisdictional authority to grant the declaration sought, as one of the employers (MINING) is not a federal work, undertaking or business.
- (2) There is no labour relations purpose to be served by granting the application, as MINING employees have already opted to be represented by the intervenor, as evidenced by the issuing of a certification order by the Industrial Relations Council of British Columbia.

The intervenor contends that this application is nothing more than a claim by the applicant to jurisdiction over work lost by a federal employer to a provincial employer.

IV

Decision

Under section 35 of the Code, for a single employer declaration to be issued, at least two federal undertakings or businesses must be associated or related.

The applicant does not challenge the fact that ATSI and MINING are two related, albeit distinct, businesses or undertakings. For the purpose of establishing its own ability to make a single employer declaration, the Board is required to ascertain that both ATSI and MINING come under its jurisdiction before going any further. If the Board finds that they do not, there is no point in going any further. For their part, the two employers allege that they come under different constitutional jurisdictions, one provincial, the other federal.

It is for the applicant to establish that the Board has jurisdiction over the respondents (see Maska Manpower Inc. (1984), 57 di 193 (CLRB n° 487)).

Even though counsel for ATSI and MINING recognize that both businesses come under common control or direction, the Board's constitutional jurisdiction over MINING is nonetheless challenged.

The Board only has jurisdiction over extraprovincial transport. The record shows that MINING is strictly involved in supplying heavy equipment (ore hauling trucks)

and in the transportation of ore from the Princeton (Similco) mine near Princeton, B.C., to dockside in North Vancouver, a wholly intraprovincial operation. Further, MINING does not hold any operating authorities of its own.

There is no dispute that the work MINING performs for Similco was, at some point in the past, carried out by members of the applicant working for ATSI. In 1987 ATSI lost that contract to Intermountain Transport, itself a federal employer. At the time, CAIMAW did not try to exert any successorship right in Intermountain.

When years later the ore hauling contract came up for bids, MINING applied and got it. MINING now performs that contract under its collective agreement with the Teamsters, under provincial labour legislation (see Arrow Mining Services, no. c49/92, March 27, 1992 (BCIRC)).

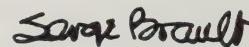
The thrust of CAW's submissions is that having MINING bid for ore hauling contracts once tendered by ATSI amounts to a transfer of work from ATSI to MINING. This would also trigger our constitutional jurisdiction over an otherwise provincial undertaking.

The Board cannot agree with that position. Either MINING, as it stands now, is federal or it is not. Considering its field of operations as revealed by the evidence, the Board cannot come to any conclusion other than finding ATSI to be under provincial jurisdiction. It follows that a single employer declaration cannot be made with respect to MINING for lack of jurisdiction.

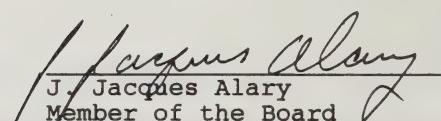
Without having to decide the question, it appears from the file that the Similco hauls were indeed intraprovincial operations at the time they were performed by ATSI, which

nonetheless remained federally regulated. The Board can only assume that it was so because these hauls were but one operation in an otherwise extraprovincial transport undertaking.

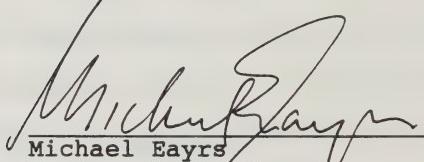
For all these reasons, this application is dismissed.



Serge Brault
Vice-Chairman



J. Jacques Alary
Member of the Board



Michael Eayrs
Member of the Board

ISSUED at Ottawa, this 19th day of June 1992.

CLRB/CCRT - 937

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information

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Summary

Dennis Hollick, complainant, and Canadian Union of Postal Workers, respondent, and Canada Post Corporation employer.

Board File: 745-4100

Decision No.: 938

The complainant alleges that the Canadian Union of Postal Workers breached its duty of fair representation, and thus contravened section 37 of the Code by deciding to withdraw the complainant's grievance without notifying him.

The Board, under the circumstances, finds that the union violated section 37 of the Code because it did not do anything to protect the complainant's interests while he was unable to handle his own affairs.

The union did not demonstrate that it had intervened on behalf of the complainant to ask for a postponement of the case in view of the particular circumstances. The union did not take further action in order to protect the interests of the complainant during his incarceration.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

Résumé

Dennis Hollick, plaignant, Syndicat des postiers du Canada, intimé et Société canadienne des postes, employeur.

Dossier du Conseil: 745-4100

Décision n°: 938

Le plaignant reproche au Syndicat des postiers du Canada d'avoir manqué à son devoir de représentation juste et d'avoir ainsi violé l'article 37 du Code, lorsqu'il a décidé de retirer le grief sans en aviser ce dernier.

Le Conseil, dans les circonstances, a jugé que le syndicat a enfreint l'article 37 du Code parce qu'il n'a rien fait pour protéger les intérêts du plaignant pendant que celui-ci était incapable de le faire.

Le syndicat n'a pas pu démontrer qu'il était intervenu au nom du plaignant pour demander le report du traitement de son dossier, étant donné les circonstances. Le syndicat n'a pris aucune mesure démontrant qu'il s'était occupé des intérêts du plaignant durant son incarcération.



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Reasons for decision

Dennis Hollick,
complainant,
and
Canadian Union of Postal
Workers,
respondent,
and
Canada Post Corporation
employer.

Board File: 745-4100

The Board was composed of Mr. J. Philippe Morneault, Vice-Chair and Messrs. J. Jacques Alary and Michael Eayrs, Members.

Appearances

Mr. Dennis Hollick, on his own behalf;
Mr. Dave Mitchell, grievance officer, for the Canadian Union of Postal Workers; and
Mr. Ian Szlazak, for Canada Post Corporation.

These reasons for decision were written by Mr. J. Jacques Alary, Member.

Mr. Hollick, the complainant, alleges that the Canadian Union of Postal Workers (CUPW or the union) failed to notify him of a meeting at which it was decided to withdraw his grievance. Mr. Hollick believes that CUPW knew at all times where he was and, by its action, it had violated section 37 of the Canada Labour Code (Part I - Industrial Relations).

This complaint was filed on December 20, 1991 and the Board held an hearing in Toronto, on June 4, 1992.

The Evidence

Before his dismissal, Mr. Hollick was an employee at Canada Post Corporation (CPC or the employer). On December 29, 1989 he was called, along with four others, to the supervisor's office. Mr. Catli, their supervisor, asked them if they had been drinking on the job. The five employees denied this fact and were told to return to their duties. Mr. Hollick said that he was not feeling well and was going home. He filled out a request for sick leave which was denied December 29, 1989.

On January 3, 1990, the complainant received a notice from the employer to attend an interview on January 4, to discuss his unauthorized absence from his work area, his absence without permission and his breach of Plant Rules concerning alcohol on the premises, all on December 29, 1989.

The employer held the meeting on January 5, 1990. Mr. Hollick attended with his union representative, Mr. R. Robinson. The complainant denied drinking; he went home sick after waiting, in his supervisor's office, to be taken to the hospital, but Mr. Catli never did take him. He denied breaching Plant Rules relating to alcohol. On the same day, a letter was sent to the complainant advising him that he was dismissed effective Monday, January 8, 1990, because of the alleged misconduct and his whole employment record.

On January 9, 1990 an unjust dismissal grievance was filed by the union representative, Mr. R. Robinson, on behalf

of the complainant. On April 10, 1990, the grievance was scheduled to proceed but the case was postponed by consent at the employer's request. Nothing transpired until early 1991 when the matter of continuation was raised by the employer.

At that time, the union made some efforts to contact the complainant at the complainant's last known address. It states that the complainant had provided the wrong telephone number and that the person who answered said that nobody who answered to the grievor's name lived there. Mr. Dave Mitchell, the grievance officer for CUPW, Toronto Region, questioned two local union officials about Mr. Hollick's situation. According to the information he received, the complainant was incarcerated for an unknown period of time. At that point, Mr. Mitchell stopped trying to locate the complainant and he feels that he made every reasonable effort under the circumstances to locate him. He then decided to withdraw the grievance and he informed Mr. Wally Legge, CPC Labour Relations, of his decision by letter with copies to the union representatives.

At the hearing, Mr. Hollick maintained that the union knew that he was incarcerated even though he had not informed the union of his change of address. He had told a union representative about his trial and the union knew where he was. The union could reach one of the family members who worked at CPC. He stated that the union had no reason to withdraw the grievance even though he was in jail.

On the other hand, Mr. Mitchell, the regional grievance officer for CUPW, told the Board that he did everything possible to reach Mr. Hollick. He followed the normal

procedure when dealing with a dismissal and tried to locate a family member. After learning that Mr. Hollick was incarcerated, he decided that he had made every reasonable effort under the circumstances and withdrew the grievance.

The employer, when asked to comment about the remedy if the Board found that there was a violation of section 37 in this case, told the Board that this was a special case because the union had written a letter on May 9, indicating that it was withdrawing Mr. Hollick's grievance. Even if the Board allows Mr. Hollick's complaint, the employer intends to raise this matter before an arbitrator to show that the arbitrator does not have jurisdiction.

The Decision

The Board must decide if the union's withdrawal of Mr. Hollick's grievance, when it knew where he was, without doing anything to represent him under these special circumstances, constitutes a violation of section 37 of the Code.

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The criteria and standards used to assess the conduct of unions in meeting the requirements of section 37 of the Code were summarized by the Supreme Court of Canada in Canadian Merchant Service Guild v. Guy Gagnon et al.,

[1984] 1 S.C.R. 509; (1984), 9 D.L.R. (4th) 641; and 84

CLLC 14,043:

"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.

2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

(pages 527; 654; and 12,188; emphasis added)

In Réjean Lalancette (1990), 81 di 53; and 91 CLLC 16,004

(CLRB no. 802), where the complainant had been incarcerated, the Board said:

"...The availability of an employee is no defence for the conduct of a union. If, in the course of an arbitration proceeding, problems arise regarding the availability of one or another of the parties to the proceeding, then these problems must be addressed in due course. The bargaining agent's full compliance with the grievance procedure does not depend on the physical presence of employees. On the contrary, where, as in the instant case, the employee involved is unable to handle his own affairs and, for all practical purposes, can only rely on third parties to protect his interests, the union must be very far-sighted in its conduct..."

(pages 59; and 14,039)

In Leclerc v. Syndicat des employés du Foyer de Kingsey Falls Inc. et al. [1989] T.T. 471, arbitrary conduct was defined as follows:

"Arbitrary conduct is defined as the casual refusal to give the required attention to a certain matter in order to reach a well-thought-out decision. It manifests itself by a negligent and capricious manner to establish and maintain an already determined conclusion, and by a declared wish not go through arbitration. It is the systematic refusal to ascertain the facts and to maintain the objective interest with respect to a problem: the opposite of submitting to the agreed upon mechanism to settle a matter in dispute."

(page 487; translation; emphasis added)

The foregoing illustrates the importance of the union acting competently without serious or major negligence. In the present case, the union did not do anything to protect Mr. Hollick's interest when he was unable to handle his own affairs. The union did not show that it had intervened on behalf of Mr. Hollick to ask for a postponement of the case in view of his particular circumstances.

When the first postponement was agreed to, Mr. Hollick was available. It is not Mr. Hollick's fault that his grievance was not processed then.

Having learned that the complainant was incarcerated, the union took no further steps to protect the interests of its member during his incarceration. It just decided to withdraw the grievance.

In the present case, we are not dealing with a minor grievance, we are dealing with a grievance of a dismissal

that can affect the complainant's entire future. The withdrawal of the complainant's grievance by the union in this case is not an administrative error such as in Brenda Haley (1980), 41 di 295; [1980] 3 Can LRBR 501; and 81 CLLC 16,070 (CLRB no. 271), it is a conscious decision by the union to withdraw the grievance after having decided that no further efforts to locate the complainant nor to protect his rights would be made.

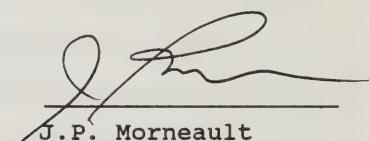
Without determining how much effort is required on the part of the union to properly discharge its duty of fair representation, it is clear in the present case that the union has not shown that it has made a sufficient effort to protect the interests of its member under the particular circumstances of this case.

After consideration, the Board finds that the union violated section 37 of the Code by acting in a manner that is arbitrary in the representation of the complainant with respect to his rights under the collective agreement that is applicable to him and therefore allows the complaint.

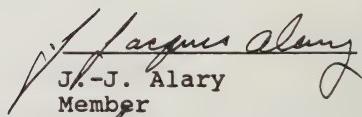
The remedy

In this case, the violation occurred when Mr. Mitchell sent the letter of May 9 to Mr. Wally Legge, CPC Labour Relations, advising him that he was withdrawing the grievance. Under the circumstances, the Board will restore the parties to the position they were in before that letter by declaring the said letter null and void and of no effect. It orders the union to continue the arbitration process contesting Mr. Hollick's dismissal and orders the complainant and the union to cooperate in this process.

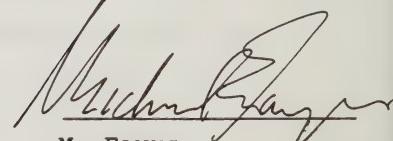
It is true that Mr. Hollick was not available during a certain period, but that was beyond the control of the employer or the union. For this reason, should an arbitrator decide that compensation is to be paid to Mr. Hollick as a result of this dismissal, the Board retains its jurisdiction in the event there is a dispute among the parties with respect to the responsibility for payment of such compensation. The Board also orders Mr. Hollick to keep the union fully informed of any change of address during this process. The Board appoints Mr. Peter Suchanek, Director of the Ontario Regional Office or any person he may designate to assist the parties if necessary in implementing this order.



J.P. Morneau
Vice-Chair



J.-J. Alary
Member



M. Eayrs
Member

DATED at Ottawa this 19th day of June, 1992

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Summary

LUC GAGNON, COMPLAINANT, CARTAGE AND MISCELLANEOUS EMPLOYEES' UNION, LOCAL 931, RESPONDENT, LOOMIS ARMORED CAR SERVICE LTD., EMPLOYER, AND UNION OF HEAVY EQUIPMENT OPERATORS, LOCAL 791, MIS-EN-CAUSE.

Board File: 745-3793

Decision no.: 939



This case deals with an unfair labour practice, that is, a breach of the duty of fair representation provided in section 37 of the Canada Labour Code (Part I - Industrial Relations). A security guard who had been accused of theft was dismissed. The union negligently processed and then abandoned the complainant's grievances. The complaint was allowed in part.

An employee who was represented by a union had been charged before a criminal court. That court had acquitted him for lack of evidence. It had deemed invalid the employee's signed confession.

The employee had filed four grievances, but the union did not deal with his case until the employee filed complaints with the Board and with Labour Canada.

The Board concludes that the union had not given the complainant the minimum representation to which he was entitled, and that the union's superficial action or inaction indicated such a complete abandon of its responsibilities that this was more than a simple problem of communication, but rather arbitrary conduct and absence of representation.

When the grievances were referred to arbitration, the union

Résumé de décision

LUC GAGNON, PLAINTAIN, UNION DES EMPLOYÉS DU TRANSPORT LOCAL ET INDUSTRIES DIVERSES, SECTION LOCALE 931, INTIMÉE, LES BLINDÉS LOOMIS LTÉE, EMPLOYEUR ET UNION DES OPÉRATEURS DE MACHINERIE LOURDE, SECTION LOCALE 791, MISE EN CAUSE.

Dossier du Conseil: 745-3793

Décision n°: 939

Devoir de représentation juste, article 37 du Code canadien du travail (Partie I - Relations du travail), plainte de pratique déloyale. Congédiement d'un gardien de sécurité accusé de vol. Grievs traités avec négligence puis abandonnés par son syndicat. Plainte accueillie en partie.

Un employé représenté par un syndicat a été accusé devant une cour criminelle qui l'a acquitté pour absence de preuve. Il avait signé des aveux jugés invalides par la cour criminelle.

L'employé avait déposé quatre griefs, mais le syndicat ne s'en est occupé que lorsque l'employé a présenté des plaintes auprès du Conseil et de Travail Canada.

Le Conseil conclut que le plaignant n'a pas eu droit à ce minimum de représentation de la part de son syndicat, dont l'inaction ou l'action superficielle sont indicateurs d'un abandon si total de ses responsabilités qu'il ne s'agit pas d'un simple problème de communication, mais plutôt d'une conduite arbitraire et d'absence de représentation.

Au moment où les griefs devaient aller à l'arbitrage, le syndicat

entrusted the investigation to its counsel's care. After examining the case, counsel determined that it would be better to abandon the dismissal grievance. The Board found that this decision did not violate section 37.

As a remedy, the Board ordered that the union reimburse the complainant for all reasonable costs incurred with regards to all proceedings instituted against the union.

en a confié l'enquête à s procureur. Celui-ci a conc après étude du dossier qu' valait mieux abandonner le gri de congédiement. Le Conseil conclu que cette décision violait pas l'article 37.

Le Conseil a ordonné comme mesu réparatrice que les frais dépenses raisonnables engagés p le plaignant, dans toutes l procédures qu'il a prises cont le syndicat, devraient lui et remboursés.

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Reasons for decision

Luc Gagnon,

complainant,

and

Cartage and Miscellaneous
Employees' Union, Local 931,

respondent,

and

Loomis Armored Car Service
Ltd.,

employer,

and

Union of Heavy Equipment
Operators, Local 791,

mis-en-cause.

Board File: 745-3793

The Board was composed of Mr. Serge Brault, Vice-Chairman,
and Ms. Evelyn Bourassa and Mr. François Bastien, Members.

Appearances

Mr. Hubert Pichet, for the complainant;

Mr. Harold C. Lehrer, accompanied by Mr. Pierre Deschamps,
president, for the Cartage and Miscellaneous Employees'
Union, Local 931;

Mr. Nicolas Di Iorio, accompanied by Mr. Brian S. Claman,
for the employer; and

Mr. François Blais, accompanied by Mr. Normand Laverdure,
for the Union of Heavy Equipment Operators, Local 791.

These reasons for decision were written by Mr. Serge Brault,
Vice-Chairman.

The Complaint

On November 18, 1990, the Board had before it for a second time a complaint filed by Luc Gagnon (the complainant), alleging that the Cartage and Miscellaneous Employees' Union, Local 931 (the Teamsters or the union), had breached its duty of representation under section 37 of the Canada Labour Code (Part I - Industrial Relations). This provision reads as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

In addition to the complainant's former employer, Loomis Armored Car Service Ltd. (Loomis), the Board impleaded the Union of Heavy Equipment Operators, Local 971 (QFL). Since this complaint was filed, the QFL succeeded the Teamsters as the bargaining agent for the group of employees to which the complainant belonged prior to his dismissal.

The complainant's allegations against his union focus on four grievances related to his dismissal. The first grievance contests a suspension, which was later transformed into a dismissal, which itself is the subject of the second grievance. The final two grievances pertain to sums owed as the result of the dismissal.

The failings that the complainant attributes to the Teamsters are of two types. First, he complains of a kind of general laxness that he equates with an absence of representation in the processing of his grievances. For

example, he accuses the Teamsters of not informing him of the steps they were taking, if any, and of dragging their feet for months. Second, he accuses them of abandoning all his grievances on the eve of their being heard at arbitration, contrary to a commitment they made.

II

Previous Proceedings

The proceedings instituted by Mr. Gagnon before the Board took several forms and progressed to various stages, all culminating in the instant decision. The various twists and turns in the proceedings give it the appearance of a labyrinth.

On January 10, 1990, the complainant filed a first complaint against the union under section 37 of the Code as the result of his dismissal (file no. 745-3512). Mr. Gagnon feared at the time that his union would not defend him and had great difficulty finding out what was happening in his case. During the course of the Board's investigation into this complaint, the union gave a formal commitment to refer all his grievances to arbitration. The complainant then abandoned his complaint in August 1990, explicitly reserving the right to file another if necessary (letter of withdrawal of August 29, 1990).

The about-face of the union, which abandoned all the grievances, led the complainant to file a new section 37 complaint (file no. 745-3793) on November 20, 1990.

On May 21, 1991, the Board, on the strength of the evidence in the file, dismissed this complaint for the following reasons:

"In assessing the facts, the Board noted in particular the union's decision to ignore its commitment, made as part of an agreement with the employer concerning other employees affected, to proceed to arbitration with the grievances in the event that the employee was acquitted of the criminal charges laid against him. The complainant was in fact acquitted of these charges. The Board also noted the reasons the union gave for its decision not to proceed following its lawyer's assessment of the case. In our opinion, nothing in the union's conduct suggests that it acted, in this crucial matter, in a manner that was arbitrary, discriminatory or in bad faith. The complainant does not share the union's opinion on his actual chances of success at arbitration. However, the action taken by the union in this case and the conclusion it reached in no way reveal a discriminatory or malicious attitude towards the complainant. As the numerous past Board decisions on this subject illustrate, the duty of fair representation does not oblige trade unions to make decisions that please everyone, but rather to ensure that their conduct and assessment of the facts are devoid of arbitrariness, discrimination or bad faith. There is no evidence before the Board in the instant case to support a finding that the union did not conduct itself accordingly.

The same conclusion applies to the other grievances in which the complainant claims that he was not properly represented by the union.

Finally, it appears to the Board that the complainant denounces his union especially for a lack of communication concerning the status of his grievances. As the Board often reminds unions in cases of this type, this is an unfortunate situation which they should make every effort to rectify. It is not, however, evidence of the kind of arbitrariness, discrimination or bad faith expressly contemplated by section 37.

Accordingly, the complaint is dismissed and the Board file in this case is closed."

(Luc Gaqnon, May 21, 1991 (LD 887); translation)

On August 2, 1991, the complainant instituted another proceeding before the Board, this time an application under section 18 of the Code to reconsider the May 21 decision and allow his complaint (file no. 530-2006). According to him, new facts that had recently come to light warranted this

reconsideration and explained the delay in filing the application. In brief, Mr. Gagnon alleged that he sought the help of the QFL when it succeeded the Teamsters. According to information obtained from the QFL, the real reason why his grievances were never referred to arbitration was not because they were determined to be without merit, but rather that the Teamsters had failed to follow the grievance procedure. According to Mr. Gagnon, these facts belied the position of counsel for the Teamsters and the positions taken in the past by the union itself.

In his application for reconsideration, Mr. Gagnon said in particular the following:

"(6) Following a verbal request from Mr. Gagnon, the latter received from the QFL, on July 8, 1991, a letter from Loomis concerning the position expressed by the employer on June 13, 1991. This letter states that Mr. Gagnon's grievances are in fact part of the group of grievances that were not filed within the prescribed time limits, the whole as it appears in Exhibit R-2 submitted in support of this application."

(translation)

The letter submitted in support of this allegation reads as follows:

*"Union of Heavy Equipment Operators
Local 791
8350 St-Michel Blvd.
Montréal, Quebec
H1Z 4G3*

Attention: Normand LAVERDURE, negotiator

Dear Sir:

The undersigned has been asked to confirm the company's position on the grievances at issue and on Mr. Gagnon's dismissal.

To this end, we are confirming that all grievances which were not filed within the time limits specified in article 15 of the collective agreement are and will be rejected because clause 15.01D stipulates the following: 'If the grievance is not processed as described above, it

will be deemed to have been withdrawn and abandoned.'

This applies to all grievances, past, present and future.

As for Mr. Gagnon's case, the company maintains its position with respect to his dismissal.

I hope that you will find this explanation satisfactory.

Carole MARCIL
Regional Manager"

(translation; emphasis added)

Counsel for Loomis replied to Mr. Gagnon's application for reconsideration before counsel for the union. Counsel argued essentially that the facts alleged by the complainant were neither new nor of any consequence.

Counsel for the union, for his part, replied as follows:

"5. With regard to paragraphs 5 and 6 of Mr. Gagnon's application, dealing with Exhibits R-1 and R-2, the union denies everything that is not consistent with said Exhibits R-1 and R-2 filed in support of Mr. Gagnon's application and adds that the facts alleged were known to Mr. Gagnon at the time he filed his complaint with the Canada Labour Relations Board and that, furthermore, these facts have no bearing whatsoever on the main reason for the union's actions, but that, on the contrary, Mr. Gagnon seems to forget that this reason was in fact the assessment of the merits of his case, which, it must be admitted, is to say the least damning.

6. The Union totally rejects Mr. Gagnon's argument that said Exhibits R-1 and R-2 constitute, in his opinion, 'new facts,' given that at the time, in the first two pages of his reply of March 5, 1991, Mr. Gagnon had already raised this question in opposing our defence, and given that he therefore had the opportunity to address this question when he filed his complaint.

7. In any case, even if Exhibits R-1 and R-2 constituted new facts, which the Union denies, and solely for the purpose of clarifying certain of Mr. Gagnon's allegations, the information relating to the question of 'time limits' for presenting Mr. Gagnon's grievances is false since the union had obtained, in Mr. Gagnon's case, a three-month extension of the time limit, as already indicated in the Board officer's report of March 19, 1991. Moreover, as for the grievance claiming sums of money, we also refer you to the Board officer's report which also mentions the existence of the memorandum of understanding which the parties signed and which

holds the grievance in abeyance pending receipt of the verdict on whether Mr. Gagnon was guilty as charged. This agreement was observed and followed by the parties concerned."

(translation; emphasis added)

Later in his reply, counsel for the union concludes as follows:

"... even if Mr. Gagnon's arguments concerning the grievance process which the union allegedly failed to follow were relevant to this case, which the union denies, these arguments were already known at the time of the Board's decision and would therefore have already been heard by the Board and there would in fact be res judicata insofar as these arguments are concerned."

(translation)

A reconsideration panel (formerly called a "summit panel") comprising Board Chairman J.F.W. Weatherill, and Vice-Chairs Louise Doyon and J. Philippe Morneau, briefly examined Mr. Gagnon's application for reconsideration and rendered an interim decision (Luc Gagnon, October 22, 1991 (LD 947)). The whole matter was referred back to the original panel that had dismissed the complaint to allow it to determine whether what the applicant characterized as "new" facts were in fact new and, if so, to assess their relevance. The original panel decided that the application for reconsideration raised facts that warranted rescinding the decision of May 21, 1991 and, consequently, without considering the merits of Mr. Gagnon's complaint at this stage, ordered that a hearing be held (Luc Gagnon, November 7, 1991 (LD 957)). This hearing was scheduled for December 9, 1991.

On December 2, 1991, on the eve of the hearing, counsel for the employer wrote to the Board to convey what it termed an important new fact which, on the face of it, resolves the matter (letter of December 2, 1991, document no. 7, file no.

745-3793). He then gave the Board the following explanation:

"You will recall that in support of his arguments on the question of time limits, Mr. Gagnon wrongly cited a letter of June 13, 1991 sent by my colleague, Guy Tremblay, to the respondent union. This letter, which does not concern Mr. Gagnon's grievance, was misinterpreted by him. He claims that the respondent union was influenced by the untimeliness of certain grievances in its decision not to refer Mr. Gagnon's grievance to arbitration.

This position taken by Mr. Gagnon is unfounded because at no time did our client raise a preliminary objection to Mr. Gagnon's suspension and dismissal grievances.

We understand from the respondent union's position that this was not the reason for its decision, as moreover the Canada Labour Relations Board has decided.

Be that as it may, it is important to note that our client has decided to reconsider its position concerning the grievances bearing numbers 9,243 to 9,259 and 9,279, in respect of which grievances it had raised a preliminary objection concerning their timeliness [see June 13th letter, supra].

Our client has decided to abandon its opposition to said grievances being heard on their merits by the arbitrator designated to hear them, André Sylvestre. My colleague, Guy Tremblay, has transmitted to me a copy of the letter that he sent on behalf of our client to counsel for the Union of Heavy Equipment Operators, Local 791, which summarizes our client's position on said grievances (other than Mr. Gagnon's grievance). We are therefore asking you to enter this letter in the file dealing with the reconsideration proceeding, in support of our submission.

Consequently, it appears that this new fact completely alters the examination of Mr. Gagnon's reconsideration application, which, for all practical purposes, is founded on the untimeliness of certain grievances other than his, and on an objection raised by the employer in this regard, which has since been withdrawn. In the circumstances, we respectfully submit that this reconsideration application ceases to apply."

(translation; emphasis added)

In short, according to counsel for Loomis, there was an alleged misunderstanding, which meant that there was no longer any basis for the reconsideration application and, indeed, the complaint.

It is in this context that a hearing was held in Montréal on December 9 and 10, 1991, as all the documentation gathered since the proceedings began had been consolidated and entered in the file of this proceeding.

Moreover, it was also made clear from the outset that the hearing would deal with the merits of the complaint and not the decision announced in letter decision no. 957 to hold a hearing.

III

The Facts

This complaint by Mr. Gagnon arises from problems he encountered after being suspended, then finally dismissed, by his employer. He has not worked since.

Mr. Gagnon keeps a file in which he has systematically recorded his conversations, meetings and other initiatives in connection with all his grievances since the fall of 1988. He discussed this file at length in his written complaint and when he appeared before the Board.

Loomis is a carrier that transports, among other things, assets for the Société de transport de la communauté urbaine de Montréal (STCUM). Mr. Gagnon was employed by Loomis as a security guard. At the time of his dismissal, he belonged to a bargaining unit governed by a collective agreement and represented by the Teamsters.

Teamsters Local 931 comprises some 5000 workers. Its president, Pierre Deschamps, has headed the local for 25 years. It has six business agents who are full-time union staff. It also has other "representatives" in the work

place, on the employers' premises. They are not full-time union staff, but rather active union members, and should not be confused with the above-mentioned "business agents."

In September 1988, following a police investigation, a number of Loomis security guards, including the complainant, were suspected of, then formally charged with, theft of STCUM property. Mr. Gagnon was then suspended without pay, which led to his filing a first grievance. He was charged with misappropriation of transportation tickets and sums of money. This suspension, pending the outcome of an investigation, lasted until the spring of 1989 when he was dismissed. He then filed a second grievance. Loomis subsequently paid him what it felt it owed him. The complainant, believing that he was not paid the correct amounts, eventually filed two other grievances. At the same time, he faced criminal charges.

At the very beginning of his problems with the employer, Mr. Gagnon had difficulty finding out what the union was doing. Generally speaking, he had to obtain the information himself; otherwise, he was simply not informed.

However, one of the union's business agents, Gerry Boutin, informed Mr. Gagnon, in April 1989, that the union would take no action on the grievances until the outcome of his trial on criminal charges was known. (His trial was postponed a number of times before it eventually took place in June 1990.)

On October 29, 1989, while attending a union meeting, the complainant met with another business agent, Pier Sauriol, who at that point assumed responsibility for his case. This agent had nothing specific to tell him about the status of his case. The complainant, however, obtained from a union

"representative," almost secretly, a copy of a "memorandum." The terms of this unsigned document were that the employer and the Teamsters agreed to hold in abeyance, without regard to the grievance procedure, all grievances of the employees suspected of theft, until the criminal court had decided their fate. This document mentioned three of the complainant's grievances, but was silent concerning his dismissal grievance. (We will have more to say later concerning this omission.) The same day, his "business agent", Sauriol, while saying nothing to the complainant about the existence of this memorandum, told him that arbitrator Jean-Pierre Tremblay would hear, if necessary, the dismissal grievance. In addition, if the complainant was prepared to plead guilty forthwith to the charge against him, he indicated that the union would certainly obtain from the employer the amounts owed him in the wake of his dismissal and that Mr. Gagnon was claiming in his last two grievances.

In this somewhat confused atmosphere of what appeared to be mutual contempt and mistrust between representatives and business agents, Mr. Gagnon feared that his union was letting him down or not representing him properly. No union official seemed able or willing to tell him, even in a remotely straightforward manner, what was going on.

Sometime later, a third business agent was put in charge of his case, which did nothing to reassure the complainant. This agent was not really familiar with the case and, like the others, seemed to be improvising. His confused statements led Mr. Gagnon to fear this time that his three grievances, but not the dismissal grievance, had simply been mislaid. On November 17, 1989, he wrote to the union president to find out what was happening. No one acknowledged receipt of his letter and no action was taken.

When his union failed to act, as a last resort Mr. Gagnon approached Labour Canada on his own and filed a complaint under Part III of the Code (Standard Hours, Wages, Vacations and Holidays) in order to claim at least the amounts owed him. Faced with this complaint, Loomis made the required payment.

Concurrently with his filing this complaint, he approached our Montréal regional office and filed, as we have seen, a first section 37 complaint (file no. 745-3512) on January 10, 1990, in which he alleged general inaction on the part of his union. The Board transmitted the complaint to the Teamsters two days later. The union then requested, and the Board granted, additional time to reply to the complaint. The union availed itself of the delay to consult the complainant regarding the grievances relating to the amounts he was claiming. The union was finally investigating. In a letter to the complainant, the union stated at the time that it was obliged to suspend the examination of his grievances pending receipt of the information required of him, such as the date he began his employment, a copy of his separation certificate, etc. On February 20, Sylvain Lapierre wrote as follows, on behalf of the union, to the Board's labour relations officer:

"WITHOUT PREJUDICE OR ADMISSION

Re: Complaint under section 97(1) - Luc Gagnon
Your file: 745-3512

Dear Sir:

Teamsters Local 971 is hereby reinstating the grievances that were the subject of the above-mentioned complaint, at the first step of the grievance procedure set out in the collective agreement.

Moreover, it is understood that these grievances are being reinstated subject to their being founded in fact and in law.

Obviously, this decision must not be interpreted as an admission of liability on the part of the union. In no way can this decision be used against it in order to claim any compensation whatsoever.

In fact, although we are capable of presenting a coherent and very clear defence against the complainant's allegations, it is better, in our opinion, to resolve the matter once and for all.

Yours truly,

*Sylvain Lapierre
Business Agent"*

(translation; emphasis added)

On March 15, the business agent again wrote to the Board:

"WITHOUT PREJUDICE OR ADMISSION

Re: Complaint under section 97(1) - Luc Gagnon
Your file: 745-3512

Dear Sir:

Further to your letter of March 2, 1990, allow me to clarify the following points.

First, this reinstatement is being done in the complainant's interest, because his grievances will be processed with all possible diligence and it is the complainant himself who, in approaching you, more or less requested this reinstatement.

Second, the parties will not raise any 'timeliness' objection resulting from the time that elapsed from the filing of the grievance to the present. However, the complainant obviously must have filed these grievances within the prescribed time limits.

Third, I have obtained the approval of Glenn P. Archambault, Director of Human Resources for Loomis Armored Car Service Inc., to reinstate these grievances. We are to meet with him this very day and we will ask him to write to you concerning this matter.

Finally, we wish to inform you that Mr. Gagnon has already received an adjustment from Loomis Armored Car Service, subject to his complaint to Labour Canada.

We hope that this information will clear up any misunderstanding.

Yours truly,

*Sylvain Lapierre
Business Agent"*

(translation; emphasis added)

Mr. Lapierre acknowledges that it was the complainant himself who, on approaching the Board, more or less requested this

reinstatement. In the same breath, he recognizes that the grievances were flawed with respect to the time that elapsed from the filing of the grievance to the present, i.e. March 15, 1990. In other words, he recognizes that there may have been problems, but assures the Board that everything is back to normal. But the Board officer advisedly decided, before closing the file in the case, to ask the employer for its opinion. In fact, what Mr. Lapierre meant by reinstating the grievances remained unclear, but seemed to mean that they would be reactivated after having been more or less abandoned or forgotten.

In his letter of March 15, Mr. Lapierre wrote that he would be meeting that very day with the company to discuss the matter. The company replied on March 23, 1990 that it would leave it to the grievance procedure to determine the amounts owed the complainant.

Barely a few days later, on March 28, 1990, the union, again through Mr. Lapierre, sent the Board a typed document entitled memorandum of understanding, bearing the date September 29, 1989 in handwriting. Mr. Lapierre wrote that this memorandum concerned the dismissals that followed the thefts committed at the STCUM. The text refers to Mr. Gagnon's four grievances. A handwritten portion of the text discusses Mr. Gagnon's dismissal grievance, while the rest of the text, with the exception of the date, is typed. In his letter to the Board, the business agent adds that all the reinstated grievances would be discussed with the employer on April 2, 1990. It was the Board that sent the complainant a copy of this letter in April 1990. (When counsel for the union refers to this document in a letter to the Board of January 24, 1991, he does not mention the dismissal grievance, although the attached memorandum discusses it.)

This memorandum contains the following provision:

"If an employee is not convicted, the union will proceed with the grievances concerned to arbitration before arbitrator Jean-Pierre Tremblay, i.r.c., who was selected by mutual agreement of the parties."

(translation)

The trial began in May 1990. According to a transcript of the proceedings, the Crown's evidence consisted essentially of an incriminating statement that Mr. Gagnon made to the police. That transcript also indicates that the Court ruled that this statement was inadmissible in evidence. The complainant was then acquitted of the charge for want of evidence. Mr. Gagnon then immediately gave the union the transcript of the trial, but not the text of his statement that was ruled inadmissible.

Pleased with the text of the memorandum, and confident that his grievances would proceed to arbitration, the complainant then withdrew his first complaint on August 29, 1990. On the same date, arbitrator Jean-Pierre Tremblay confirmed to the union that he would hear the parties on November 22, 1990.

Mr. Gagnon waited. Whether he communicated by telephone or by letter, he was not able to extract any useful information from the union. He learned eventually that all his grievances were to be heard by the arbitrator, probably in November 1990. He was told in October to go and see Mr. Lehrer, counsel for the union, who was in charge of the investigation. The complainant met with him twice, on October 22 and 23, 1990.

Mr. Gagnon gave counsel the transcript of his preliminary hearing. A copy had been given by him to the business agent the previous June, but Mr. Lehrer in all likelihood did not

have it. Counsel learned from the document that there was a statement, of which he asked to see the text. The complainant brought him the text the following day.

Counsel then informed Mr. Gagnon that although his statement had not been accepted by the criminal court, it was very damaging evidence in his arbitration case. According to counsel, the rules of evidence that applied at arbitration would not prevent the employer from calling as witnesses the police officers who had obtained this statement if ever the arbitrator were in fact to refuse to admit the document.

Mr. Lehrer concluded the discussion by informing the complainant that he would contact the lawyer who had represented him in criminal court to find out the specific reasons why the judge had rejected the statement. Mr. Lehrer wrote as follows to the Board concerning this matter on March 13, 1991:

"Insofar as the admission by Mr. Gagnon is concerned, the undersigned was advised by Mr. Gagnon that the said document was declared to be inadmissible before the Criminal Court, based on a technicality.

No further information was supplied in this regard.

However, I did enquire and received the name of a criminal lawyer handling the case. I further communicated with the said attorney who was not able to shed any further light nor to inform the undersigned of any details of why the declaration was declared inadmissible.

In any event, it was the opinion of the undersigned that an Arbitration Board would not be bound to the said decision and that either the admission would be admissible before an Arbitration Board or in the event that Mr. Gagnon denied the contents of the admission before the arbitrator, in all likelihood the employer would call the two police officers who witnessed the admission, with respect to the fact that same were made before them by Mr. Gagnon.

In fact, at no time did Mr. Gagnon deny the facts contained in the said admission but merely insisted that same was not admitted before the Criminal Court."

During his cross-examination, Mr. Gagnon confirmed, in response to a question from Mr. Lehrer, that counsel had in fact been in touch with his criminal lawyer.

Finally, after telling Mr. Gagnon of his serious doubts concerning success at arbitration, Mr. Lehrer informed him that he would report to the union. No written report was produced. According to the union president, Mr. Lehrer indicated verbally that he felt there was no merit to the grievance and recommended that it be abandoned. In the ensuing days, in a letter to the arbitrator assigned the case, Mr. Lehrer told him that the union was withdrawing from Mr. Gagnon's case and sent a copy of his letter to the complainant, without an explanation. It was then November 1990.

Feeling cheated, Mr. Gagnon sought, and the Board granted, permission to reactivate the complaint he had withdrawn once he was assured of arbitration. This complaint was summarily dismissed by our panel under section 98(2) on May 21, 1991 (see page 4 above).

During the recent hearing in this case, the union attempted to submit in evidence, during cross-examination of the complainant, a copy of the letter that Mr. Gagnon categorically denied receiving. This document, signed by the union president and dated the end of October 1990, informed Mr. Gagnon of the union's decision to abandon his dismissal and related grievances.

The surfacing of this letter of October 1990 at the hearing was especially strange because no one had referred to it before, although the complainant had repeatedly contacted the union, either by telephone or in writing, often by registered mail, to find out what action had been taken on his grievances.

Not one of the union representatives who signed other documents submitted by the union was called to testify, except for Mr. Deschamps. No explanation was provided as to why the existence of these documents was not revealed sooner, or why the October 31st document apparently did not reach Mr. Gagnon. It is in the light of this evidence that the Board must deal with this complaint.

III

The Arguments

In both his written and oral submissions, counsel for the complainant equated the duty under section 37 with the obligation of a good citizen who, acting as a reasonable person, must do his civic duty. He described the repeated inquiries Mr. Gagnon made of his union, verbally and in writing, while the union never even bothered to act on these inquiries, or if it did, had not told him so.

Counsel stressed the vagueness of the union's actions. There was some discussion concerning the grievances Mr. Lehrer had withdrawn on behalf of the union in November 1990. Specifically, were the other three grievances Mr. Gagnon filed in addition to his dismissal grievance simply forgotten?

Counsel for the union, for his part, cited in particular the Supreme Court judgment in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509; (1984), 9 D.L.R. (4th) 641; and 84 CLLC 14,043. In counsel's opinion, Mr. Gagnon was complaining of what were in fact simple poor communications between him and his union. The lack of or deficient communication between a worker and his union, argued counsel, did not constitute a violation of the Code.

On the merits, counsel noted the admission made by counsel for the opposing party during his arguments when he stated that the union's withdrawing the dismissal grievance was reasonable, given the opinion expressed by Mr. Lehrer following his investigation. Mr. Lehrer added that even if his legal opinion had been ill-founded, this would change nothing because, in any case, the union showed good faith. He also relied on the union president's testimony that the Teamsters had decided not to proceed solely on the basis of the investigation and his legal opinion.

Counsel for the employer, for his part, confined himself to the role of observer. He recalled briefly the remarks he had made at the start of the hearing concerning the procedure followed. In his opinion, the Board had agreed to hear this case because the complainant had cited so-called new facts. According to him, the hearing had not revealed any new facts and that should suffice to dispose of the matter.

Counsel for the mis-en-cause union, for his part, pointed out that his role too was that of observer. Should the Board decide to defer the case to arbitration, his client was prepared to prosecute the matter on the complainant's behalf provided that it was not ordered to pay any financial compensation as the result of raiding, for a violation the Teamsters had committed.

IV

Analysis of the Duty of Fair Representation

Before we examine the union's conduct, a review of the principles and criteria governing the duty of fair

representation under section 37 of the Code appears to be necessary in the circumstances.

The Supreme Court of Canada very recently did a very thorough analysis of the duty of fair representation under the common law and the Canada Labour Code (Gendron v. Supply and Services Union of the Public Service of Alliance of Canada, Local 50057, [1990] 1 S.C.R. 1298, pages 1312-1216).

The Court recalled, among other things, that the Canadian judiciary, drawing upon American case law, began in 1969 to recognize that there was a duty of fair representation, long before this duty was codified in 1978 by Parliament (R.S.C. 1970, c. L-1, s. 136.1). The Court noted in Gendron, supra, that Parliament drew heavily on existing case law in framing this duty in what was then section 136.1 of the Canada Labour Code:

"From a reading of s. 136.1, it is evident that Parliament had recourse to the common law duty in framing the statutory duty. The words 'fairly and without discrimination', among others, refer to the content of the duty as it has developed at common law. . . ."

(page 1316)

The test developed concurrently by the common law courts and the various labour boards across the country, including this Board, to define the scope of this duty was analysed by the Supreme Court in 1984 in the leading case Canadian Merchant Service Guild v. Guy Gagnon et al., supra. Based on this analysis, the Court developed the following test for determining the scope of the duty of fair representation without, however, distinguishing the common law duty from the statutory duty:

"The following principles, concerning a union's duty of representation in respect of a grievance,

emerge from the case law and academic opinion consulted.

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in this unit.

2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

(pages 527; 654; and 12,188; emphasis added)

Thus, if the common law duty and the duty under section 37 of the Code have the same scope, as the Supreme Court concludes in Gendron, supra, at page 1319, what differentiates them is their context. The latter is part of a complete and comprehensive scheme to harmonize the collective labour relations of three categories of players whose interests obviously do not always coincide. The statutory duty set down in section 37 is, moreover, accompanied by remedial provisions that provide for a whole range of remedies far superior to the common law remedies. This is what led the Supreme Court, in Gendron, supra, at page 1318, to conclude as follows: "The common law duty adds nothing to the effectiveness of the Canada Labour Code and serves no purpose in situations where, as here, the Code applies."

In short, the important thing to remember from this long introduction is that the duty of fair representation introduced into the Code in 1978 superseded, in this jurisdiction, the duty of fair representation at common law. These two systems of liability exclude any application of the rules of civil liability that rests with the mandatory within the meaning of the Civil Code. This is especially true because the status of bargaining agent under the Code is very different from that of a mandatory. It follows that, if for this reason alone, counsel for the complainant's suggestion that all negligence entails union liability is ill-founded. What section 37 prohibits is gross negligence on the part of the union, not simple negligence (see Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304)).

In the instant case, the Board must first determine whether the union's conduct, as revealed by the evidence and as counsel for the union claims, shows at most a communication problem, in which case its conduct would not be subject to section 37 of the Code. To deal with this question, it is useful to recall the test adopted by this Board to assess a union's conduct in relation to its duty of fair representation under section 37 of the Code.

In Brenda Haley, supra, the Board, meeting in plenary session, explained, among other things, its broad role under section 37 and described certain conduct prohibited by this section, including serious or gross negligence:

"It is not the Board's task to reshape union priorities, allocate union resources, comment on leadership selection, second guess its decisions, or criticize the results of its bargaining. It is our task to ensure it does not exercise its exclusive majoritarian based authority unfairly or discriminatorily. Union decision makers must not act fraudulently or for improper motives such as those prohibited by human rights legislation or out of personal hostility, revenge or dishonesty. They must not act arbitrarily by

making no or only a perfunctory or cursory inquiry into an employee's grievance. The union's duty of fair representation does not guarantee individual or group union decision makers will be mature, wise, sensitive, competent, effectual or suited for their job. It does not guarantee they will not make mistakes. The union election or selection process does not guarantee competence any more than the process does for those selected to act in other democratic institutions such as Parliament or appointees to administrative agencies.

But the law does not condone all good faith action. Some action or inaction is such a total abdication of responsibility it is no longer mere incompetence - it is a total failure to represent (e.g. Forestell and Hall, *supra*). Some conduct is so arbitrary or seriously (or grossly) negligent it cannot be viewed as fair. This is especially so when a critical job interest of an individual is at stake."

(pages 324-325; 131-132; and 615; emphasis added)

In André Cloutier (1981), 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16,108 (CLRB no. 319), the Board identified three factors that must be taken into account in assessing a union's conduct: the nature of the grievance filed; the characteristics of the bargaining agent; and the steps taken by the bargaining agent in fulfilling its duty toward the complainant member of its bargaining unit. The Board said this:

"Let us examine each element of this analysis.

1. - *The nature of the complaint*

...

It goes without saying that a grievance involving a situation where an employee's career is on the line, demands the bargaining agent's full attention and energy, more so than any other type of grievance. ...

...

It logically follows that allegations of violation of section 136.1 resulting from grievances where a bargaining unit member's career is at stake will be scrutinized more by the Board just as they must be by the bargaining agent.

In its appreciation of the importance of the nature of the complaint, the Board will investigate whether the bargaining agent understood and respected this distinction.

However, to say that all complaints before the Board having to do with dismissals will be upheld would be a gross exaggeration. A decision taken by a bargaining agent not to defend a dismissal grievance or one which holds a career at stake, if taken conscientiously, will be upheld by the Board, even if deep down the Board were to conclude that had it been in the bargaining agent's shoes, it might have come to a different decision.

2. - The characteristics of the bargaining agent

...

Some unions chosen by employees are better equipped than others financially and administratively. The degree of sophistication between one bargaining agent and another can vary ad infinitum. Consequently, the services which they are in a position to provide to their members and to the members of the bargaining unit will also vary. The Board must keep this in mind when investigating duty of fair representation complaints.

...

Obviously the degree of sophistication of one bargaining agent as opposed to another will be taken into account by the Board as it seeks to determine whether the union discharged its duty of fair representation in a reasonable fashion. We apply the same standards, but we will vary the power of our microscope, increasing it according to the degree of sophistication of the bargaining agent.

...

3. - Steps taken by the bargaining agent

Finally, in each case, the Board will investigate in detail the steps taken by the bargaining agent in processing a grievance filed by a member of its bargaining unit. Based on the evidence before it, the Board will enquire into the practices, policies and criteria normally and regularly followed by the union in similar cases. At the same time, the Board will bear in mind the union's abilities and talents as mentioned above, and how they have been put to use by the union in its handling of the case under study. In this fashion we can determine if the union has acted reasonably, without discrimination, in good faith and not in an arbitrary manner concerning the file as compared to similar ones which regularly come before it."

(pages 226-230; 338-341; and 698-701)

With regard to what the union considers the crux of the complainant's complaint, i.e., the communication issue itself, the Board, while being often critical of unions for

their poor communications with members, has generally held that this failing does not constitute a violation of section 37. (See, for example, Manuel Silva Filipe (1982), 52 di 20; and 2 CLRBR (NS) 84 (CLRB no. 397), pages 24-25; and 89-90; Serge Gervais (1983), 53 di 104 (CLRB no. 418), page 112, affirmed by the Federal Court of Appeal (file no. A-874-83, November 5, 1984); Michael J. Roberts (1986), 63 di 208 (CLRB no. 548), page 214; Martin Muranetz (1986), 64 di 23 (CLRB no. 553), pages 34-35; and Gail McDonough (1989), 78 di 28 (CLRB no. 745), pages 37-38.)

In letter decision no. 887 of May 21, 1991, this Board panel itself adopted this interpretation when it concluded as follows:

"Finally it appears to the Board that the complainant denounces his union especially for a lack of communication concerning the status of his grievances. As the Board often reminds unions in cases of this type, this is an unfortunate situation which they should make every effort to rectify. It is not, however, evidence of the kind of arbitrariness, discrimination or bad faith expressly contemplated by section 37."

(translation)

In Jacqueline Brideau (1986), 63 di 215; 12 CLRBR (NS) 245; and 86 CLLC 16,012 (CLRB no. 550), the Board, however, pointed out the following:

"Although the lack of communication between the union and Brideau in the instant case did not result in a violation of section [37], this does not mean that the Board does not consider communication to be an element that can never give rise to a section [37] violation."

In handling a grievance and dealing with the employer, it is incumbent on the union to ascertain, from all necessary sources, the facts giving rise to the grievance. These facts can be elicited from either the grievor, other persons knowledgeable about the incident ... or documentary evidence.

...

Thus, there is no obligation to communicate with the grievor, but if the lack of communication results in a situation which prejudices the position of the grievor, then that omission can result in a violation of section [37]."

(pages 239-240; 269-270; and 14,109; emphasis added)

We share this view. In fact, if the Board concluded that poor communication between a union and an employee did not constitute generally a violation of section 37, it is mainly because it had determined, rightly in these cases, that the union's conduct in the actual processing of the grievance still met the minimum requirements of the Code.

In conclusion, past Board decisions reveal that if a lack of communication "is not per se a violation of a union's duty of fair representation" (Clarence R. Young (1989), 78 di 117 (CLRB no. 753), page 121), it is nevertheless a factor the Board must often take into account in properly assessing a union's conduct.

V

Analysis of the Teamsters' Conduct

Let us now turn to the instant case. First, it is recognized that because of the nature of one of the complainant's grievances, i.e. his dismissal grievance, the union had to act with particular tact and diligence. Further, three business agents of Teamsters Local 931 were assigned to Mr. Gagnon's grievances. They are full-time union staff whose competence and experience were not questioned by the union, whose president has remained the same for 25 years.

When the actions taken by these business agents in processing Mr. Gagnon's grievances are examined, it is clear that for much of the time they let the grievances lie idle in their desk drawers, or simply forgot about them, until they were "reinstated." In fact, in our opinion, their actions were often in reaction to Mr. Gagnon's many initiatives. As we have seen, Mr. Gagnon had to fight more than once to prod the union into action; he approached Labour Canada under Part III of the Code, and this Board under Part I. In the light of the evidence, we do not find that Mr. Gagnon overreacted or erred on the side of caution in pushing his union as he did.

Take, for example, the amounts owed the complainant. They were unquestionably owed him because Loomis paid them as soon as a complaint was filed under Part III of the Code. The union says that it supported the complaint. The truth is that it was its inaction that made this complaint necessary. The Board believes that it was the filing of the complaint with Labour Canada that really caused the union to act, and not the reverse. The same can be said of the "reinstatement" of the grievances. It was a complaint that led to their reinstatement, and not the union's diligence.

Besides nonchalantly letting Mr. Gagnon's grievances lie idle in their desk drawers, the business agents provided him with only partial answers that were full of inaccuracies and half-truths, if indeed they were not blatantly false. Only at the hearing did the union tell us of the existence of voluminous correspondence that had apparently been piling up for two years. Clearly the Board did not have all the facts at its disposal when it rendered its original decision (LD no. 887), this despite efforts by the complainant and our investigating officers to gather them.

The circumstances in which the famous memorandum was concluded are hardly more reassuring. The fact that Mr. Gagnon's rights were finally committed to writing in the form of a memorandum, immediately following the conclusion of the criminal proceedings, seems perfectly normal. The way in which the parties concerned went about it, however, remains unexplained and looks like a coverup. At the end of October 1989, Mr. Gagnon came by an unsigned document entitled memorandum, which dealt with his grievances. However, not until a year later, after a complaint was filed and the Board brought its authority to bear, did the complainant obtain a duly signed copy from his union that would attest that proper attention had been given to him and his dismissal grievance. Oddly, the memorandum is dated September 28, 1989, a month before Mr. Gagnon obtained almost secretly an incomplete copy of it. However, the business agent never mentioned a word to him, despite the numerous occasions on which the complainant asked him questions about it. It was as if the document had not been signed or did not yet exist. It is another situation where the Board is satisfied, on the basis of the evidence, that it was Mr. Gagnon's complaint which led to either the signing of the memorandum or at the very least to its being corrected.

When a union member has to file a complaint with the Board in order to be reasonably informed of the status of his grievances (one of which contests his dismissal), or when he has to resort to Labour Canada to obtain reimbursement of sums owed him by an employer because of his union's failure to follow the grievance procedure provided for this purpose, the problem is no longer one of simple communication, but rather of a lack of representation or of gross negligence.

In fact, certain appearances notwithstanding, there was a lack of representation right up to November 1990, when counsel for the union first seriously took in hand Mr. Gagnon's grievance. As a compulsory contributor of dues to Teamsters Local 931, the complainant had paid for services to which he was entitled. These services are directly related to rights arising from a collective agreement, a part of which is the grievance procedure which is mandatory under section 57 of the Code.

A union must process grievances genuinely, and not merely perfunctorily or superficially. There is no justification for the kind of mystery or systematic inaccessibility that marked all the union's action. We are not dealing here with a union organizing campaign in a hostile environment, but rather with the application of a collective agreement. At issue here are not the whims of a nitpicker, but rather the legitimate concerns of a dismissed employee. Had the union officers really been concerned about their duty of representation, they would not have displayed such indifference which, in our opinion, constitutes arbitrary conduct contrary to section 37 of the Code.

Ontario authors Sack and Mitchell aptly summarized the position of the Ontario Labour Relations Board on the notion of arbitrary conduct as we perceive it in the instant case:

"Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter, or to inquire into or to act on available evidence, or to conduct any meaningful investigation to obtain the data to justify a decision; it has also been described as acting on the basis of irrelevant factors or principles, or displaying an attitude which is indifferent and summary, or capricious and non-caring or perfunctory. ..."

...

The Board has said, however, that there comes a point when mere negligence becomes gross negligence which may be viewed as arbitrary when

it reflects a complete disregard for critical consequences. . . ."

(Jeffrey Sack and C. Michael Mitchell, Ontario Labour Relations Board Law and Practice (Toronto: Butterworths, 1985), page 477; emphasis added)

Moreover, in Jacques Becotte, [1979] T.T. 231, the Quebec Labour Court also held that a union's inaction in processing grievances could constitute gross negligence:

"It will then be possible for an employee to complain that his association let his grievance lapse. The onus will then be on him to show that this action constitutes not only negligence by his association, but also serious negligence. This is why, with all due respect for the opposing opinion, I believe that it is the Court's responsibility to analyse each situation to determine whether this action, taking into account the context in which it occurred, really constitutes a case of serious negligence on the part of the association.

Many factors may account for a union's delay in referring the grievance to arbitration. Moreover, this is why the degree of negligence shown by the union in referring its member's grievance to arbitration in due course could conceivably vary. Clearly, any delay is not synonymous with serious negligence, and only in the latter situation will the Court intervene (because it does not appear to me that simple negligence could lead the Court to grant the employee redress). Is this delay attributable to a misunderstanding, a misinterpretation of the time limits, incorrect routing of the grievance, an oversight, a change in union representatives, etc.? These are all situations that the Court must assess. It is quite clear that if the union representatives heedlessly let the grievances lie idle in their filing cabinets and present them to the employer only at the repeated insistence of the employee, it will be easy to conclude that the union's nonchalance may have constituted serious negligence."

(pages 235-236; translation; emphasis added)

The duty of fair representation presupposes that at **each step in the processing of a grievance**, the union deals with it "objectively and honestly," to quote the words of the Supreme Court in Canadian Merchant Service Guild v. Guy Gagnon et al., supra. Communication with the employee is necessary to ensure objective and honest processing. Employees are sometimes criticized for being the authors of

their own misfortune in fair representation proceedings by not providing the union with all relevant information. Such is not the case here.

In conclusion, the evidence reveals that Mr. Gagnon did not receive the minimum representation to which he was entitled from his union. Its inaction or superficial action until November 1990 shows, in our opinion, such a total abdication of its responsibilities that the problem is not one of simple communication, but rather of a lack of representation. The Board therefore allows this part of Mr. Gagnon's complaint.

What of the subsequent abandoning of the grievances? On this question, the Board does not see how it could conclude that the union breached its duty of fair representation in deciding to withdraw Mr. Gagnon's grievances on the eve of their hearing at arbitration.

That decision followed the serious investigation conducted by Mr. Lehrer and was taken on his recommendation. Moreover, counsel for the complainant himself acknowledged, during his argument, the validity of the legal opinion on which the union based its decision not to proceed to arbitration.

It may seem paradoxical to find the processing of certain grievances contrary to the Code and at the same time find their eventual abandonment consistent with the Code. This contradiction is merely apparent. The right to representation is of an ongoing nature; however, it does not carry an obligation for a union to refer all grievances to arbitration. It must, however, address them. In the instant case, only after a serious examination of them, could the union have abandoned them without violating the

Code. Had it decided not to pursue them in as nonchalant a manner as it displayed earlier, it would have unquestionably violated the Code as well. It is not the decision to drop per se that offends the Board, but rather the way in which the decision has been made.

The real paradox, however, as we are well aware, is telling the complainant that he was not the victim of poor representation when the decision was made to abandon his grievances.

VI

The Board therefore allows the complaint in part and finds that the union breached its duty of fair representation in acting in a manner that was arbitrary in its processing of Mr. Gagnon's grievances.

In Gendron, supra, the Supreme Court recognized that the Canada Labour Code confers broad discretionary power on the Board to fashion remedies for violations of the duty of fair representation:

"The remedial provisions improve significantly the position at common law of an aggrieved person. At common law, courts were restricted to an award of damages, whereas under the Canada Labour Code a broad range of remedies designed to 'make whole' are available. The range of remedies recognizes that often an award of damages will only go a short distance in remedying the effects of a breach. Parliament has substituted a broad, comprehensive, remedial scheme much superior to an award of damages available at common law. George W. Adams in his text Canadian Labour Law (1985) concludes that the Board has a wide discretion in choosing an appropriate remedy. At page 767 he states:

'In deciding upon a remedy, a board will consider the size and resources of a union as mitigating factors. ... The remedy can be innovative, and can affect the employer. Where the complaint concerns the failure to pursue a grievance to arbitration, labour boards have ordered the trade union to take the grievance to arbitration, and the employer to waive any preliminary objections'

to arbitration such as the issue of expired time. ... Trade unions have also been directed to arbitrate grievances and to permit the complainant employee to choose independent legal counsel. ..." [Citations omitted.]"

(page 1318)

More particularly, section 99(1)(b) of the Code stipulates the following:

"99.(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with ... and may

...

(b) in respect of a contravention of section 37, require a trade union to take and carry on on behalf of any employee affected by the contravention or to assist any such employee to take and carry on such action or proceeding as the Board considers that the union ought to have taken and carried on on the employee's behalf or ought to have assisted the employee to take and carry on; ..."

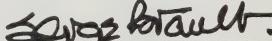
Moreover, section 99(2) states the following:

"99.(2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives."

Since we have concluded that the eventual abandonment of the grievances did not violate the Code, the remedy provided for in section 99(1)(b) does not apply in the circumstances.

However, since the complainant incurred expenses and had to hire a lawyer to bring his union to represent him in accordance with section 37, it seems fair to us and consistent with the need to ensure fulfilment of the objectives of Part I of the Code, to order the union to reimburse the complainant all reasonable expenses he thus incurred, including his lawyer's fees. This redress will, in our opinion, remedy the consequences of the absence of union representation.

The Board appoints Ms. Suzanne Pichette, regional director of our Quebec office, to assist the parties in implementing this decision. Should the parties fail to reach an agreement, the Board will determine on request the quantum to be paid to the complainant.

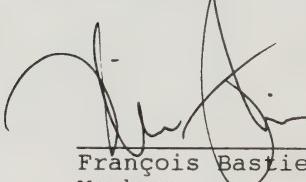


Serge Brault
Vice-Chairman



Evelyn Bourassa
Member

I concur with these reasons.



Francois Bastien
Member

ISSUED at Ottawa, this 23rd day of June 1992.

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Summary

Robert J. Gillis et al., employees, and Cape Breton Development Corporation, Sydney, Nova Scotia, employer.

Board File: 950-234

Decision No.: 940

Six employees of Cape Breton Development Corporation exercised their right to refuse unsafe work in the Phalen Mine at Sydney, Nova Scotia. When the safety officers ruled there was no danger, the employees referred the decision to the Canada Labour Relations Board, pursuant to section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health). Before the Board had an opportunity to inquire into the matter, the employees informed the Board they wished to withdraw the referral. The employer opposed the request for a withdrawal.

The Board found that employees may apply to the Board to withdraw a referral made pursuant to section 129(5) of the Code and that the Board has the discretion to grant the request.

The employer wished to have an inquiry proceed because it feels a Board decision would bring finality to the issue of danger in that particular situation. Thus employees could not refuse over the same issue in the future. The Board commented that under section 129(5) its only role is to confirm a safety officer's decision or give an appropriate direction.

The employer suggests that some employees are misusing the right to refuse under the Code. In proceeding pursuant to section 129(5), the Board does not deal with alleged abuses of the right to refuse.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

Résumé

Robert J. Gillis et autres, employés, et Société de développement du Cap-Breton, Sydney (N.-É.), employeur.

Dossier du Conseil: 950-234

Décision n°: 940

Six employés de la Société de développement du Cap-Breton ont exercé leur droit de refuser d'effectuer du travail dangereux à l'exploitation minière Phalen, à Sydney, en Nouvelle-Écosse. Lorsque les agents de sécurité ont jugé qu'il n'y avait pas de danger, les employés ont renvoyé cette décision au Conseil canadien des relations du travail en vertu du paragraphe 129(5) du Code canadien du travail (Partie II - Sécurité et santé au travail). Avant que le Conseil n'ait eu la possibilité de faire enquête, les employés ont informé celui-ci qu'ils désiraient retirer leur renvoi. L'employeur s'opposait à la demande.

Le Conseil estime que des employés peuvent lui demander de retirer un renvoi fondé sur le paragraphe 129(5) du Code et qu'il a toute la latitude pour agréer la demande.

L'employeur voulait qu'une enquête se poursuive parce qu'à son avis une décision du Conseil pourrait régler de façon définitive la question de danger dans ces circonstances. Les employés ne pourraient donc pas refuser de travailler si cette question surgissait à l'avenir. Aux termes du paragraphe 129(5), le rôle du Conseil consiste à confirmer la décision d'un agent de sécurité ou à donner les instructions indiquées.

L'employeur prétend que certains employés abusent du droit de refuser de travailler conféré par le Code. Lorsque le Conseil doit trancher une question fondée sur le paragraphe 129(5), il ne s'occupe pas de prétendus abus du droit de refuser de travailler.



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Travail

Reasons for decision

Robert J. Gillis et al.,
employees,
and
Cape Breton Development
Corporation,
Sydney, Nova Scotia,
employer.

Board File: 950-234

The Board consisted of Mr. Calvin B. Davis, Member, acting as a single member panel, pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances (on record)

Robert J. Gillis et al., employees, represented by Mr. Glayan Wujcik; and
Mr. Keith F.S. Crocker, Legal Counsel and Corporate Secretary, for the employer.

Six employees of Cape Breton Development Corporation (DEVCO) exercised their right to refuse unsafe work in the No. 6 East Top Section of Phalen Mine, located at Sydney, Nova Scotia. When the safety officers ruled there was no danger, the employees referred the decision to the Canada Labour Board pursuant to section 129(5) of the Code. However, before the Board had an opportunity to inquire into the matter, Mr. Glayan Wujcik, the person authorized to represent the employees informed the Board they wished to withdraw the referral. The employer opposed the request for a withdrawal.

On May 14, 1992, the Board granted the withdrawal and informed the parties it would be issuing reasons for this decision.

The refusing employees protested that the employer no longer used steel booms and steel legs to support the roof of the mineshaft. As stated in the safety officers' report:

"The refusal to work was based on two points:

- (i) four facemen stated: 'The exit from the face is not supported adequately and therefore not safe'.
- (ii) two back boomers stated: 'unsafe to work without steel booms'."

In accordance with section 129(2)(b) of the Canada Labour Code, the safety officers made the following decision:

"A condition did not exist in the place in respect of which the investigation was made that constituted a danger to the employees making the refusal."

In a letter opposing the withdrawal, the employer laid out its reasons why the Board should not grant it.

"Section 129(5) is the Code provision by which an employee may require a safety officer to refer to the Board any decision made by the safety officer under Section 129(2). In this matter, a decision of utmost importance to the employer was rendered on 1992-03-26 and formal notice thereof given the next day jointly by Safety Officer No. 1623, T.E. Smales, and Safety Officer No. 1621, Frank Andrews. On 1992-04-06, Mr. Andrews, having been required to do so by certain employees, complied with Section 129(5) and referred his and Mr. Smales's decision to the Canada Labour Relations Board. The Safety Officers' referral was received in your office the next day.

The employer understands that neither of the Safety Officers has 'withdrawn' his referral. The employer submits that the Safety Officers cannot so withdraw while their decision remains questioned. The employer also understands that none of the employees involved has confirmed to either the Safety Officer(s) or the Board that the correctness of the Safety Officers' decision is no longer questioned. The employer therefore further submits that the employees' 'withdrawal' about which you have informed the Board at

Ottawa is not contemplated by the Code under the circumstances, and is not permitted.

There is nothing for the employees to withdraw. They have triggered the mechanism [sic] of Code s.129(5) and s.130. To ensure the removal of any and all danger alleged by these employees through the Code's process, the Code section 130(1) now requires that the Board, 'without delay and in a summary way inquire into the circumstances of the [Safety Officers'] decision and the reasons therefor...' [Emphasis added.] Employees cannot be allowed to manipulate due process by a spurious argument that their allegations of danger have been withdrawn, simply because the alleged danger is neither imminent nor pending. Should the employer in this case resume strata control using roof bolts without supplemental steel booms, refusals to work would recur and the Code's process would be re-used. Without valid confirmation to the contrary, the Board, the employer and the Safety Officers involved are entitled to make that assumption as the basis of the conclusion that these employees have withdrawn nothing.

The employer suspects on the contrary that the employees -- or the union officials urging them on for reasons totally unrelated to safety -- do not want the process they have triggered to continue towards what they belatedly realize will be its most likely conclusion: confirmation by the Canada Labour Relations Board of the Safety Officers' decision that the employer's intended application of the roof-bolt method of strata control is safe. The employees know they have not a shred of evidence upon which to base their allegations of danger; they know that the Safety Officers' decision last month was correct.

Sections 128-134 of the Code do not comprise civil procedure, wherein parties may voluntarily or contractually agree to withdraw claims. Part II of the Canada Labour Code deals with a subject of national concern, the safety of federal employees. Offences under the Code are of a quasi-criminal nature, and the penalties prescribed fit that status. The Safety Officers and the employer in this matter deserve to have the air cleared. Otherwise Part II will be rendered ineffective through unwarranted manipulation by persons whose motives, the employer believes, have nothing to do with safety. Industrial relations problems are not the subject of Part II where safety is not at issue. In order to prevent the employer's lawful operations being held hostage to such problems in the guise of a safety concern, manipulation of the process must be avoided and Part II's true purpose must be fulfilled."

Board. In this letter the employer points out that a series of refusals occurred and fears that if the inquiry is dropped "patent manipulation will have resulted."

The Board has considerable discretion as to how it conducts its proceedings. This was discussed thoroughly in Canada Post Corporation (1987), 70 di 1; and 16 CLRBR (NS) 310 (CLRB no. 628):

"The only issue that is left to be resolved is whether or not the Board has discretion to grant the withdrawal of Canada Post's application. ..."

Practice aside, however, we are of the view that the Board does possess the necessary legal discretion in this matter. The Board derives its powers to control its own procedure from sections 117, 118 and 121 of the Code.

Those sections provide the Board with a considerable amount of latitude as to how it is going to conduct its proceedings as distinguished from a court of law. The latitude vested in tribunals such as the Board was recognized by the Supreme Court in the case of Komo Construction v. Commission des relations de travail du Québec, [1968] S.C.R. 172:

'... While upholding the principle that the fundamental rules of justice must be observed, one must be careful not to impose a code of procedure on an organization that the legislation has rendered master of its procedure.'

(page 176; translation)

...
And reference might again be made to the Federal Court of Appeal judgment in dealing with the stay proceeding initiated by the various bargaining agents. Although made in reference to section 122(2) of the Code, it does indicate the intention of Parliament that proceedings before the Board should continue to the natural conclusion.

Thus, in general terms, so long as we are exercising an authority within the context of the Code, and in keeping with the rules of natural justice, and with a view to promoting harmonious labour relations for the public good as set out in the Preamble to the Code, we believe that the powers conferred on the Board are broad enough to determine whether it will grant a withdrawal."

(pages 22-23; and 332-333)

The decision from which the above passage was taken was upheld in Canada Post Corporation v. Canadian Union of Postal Workers' et al., no. A-307-87, September 8, 1987, (F.C.A.). Although the passage refers specifically to Part I of the Code, the Board is of the opinion that it enjoys the same discretion to grant a withdrawal in respect of proceedings under Part II:

"156. (1) Notwithstanding subsection 14(1), any member of the Board may dispose of any reference or complaint made to the Board under this Part and, in relation to any reference or complaint so made, any member

(a) has all the powers, rights and privileges that are conferred on the Board by this Act other than the power to make regulations under section 15; and

(b) is subject to all the obligations and limitations that are imposed on the Board by this Act.

(2) The provisions of Part I respecting orders and decisions of and proceedings before the Board under that Part apply in respect of all orders and decisions of and proceedings before the Board or any member thereof under this Part.

Accordingly, under Part II, employees may apply to the Board to withdraw a referral made pursuant to section 129(5). Ordinarily, the Board would grant the withdrawal without reasons. But in this particular case, it is advisable to let the parties know of the reason the Board is granting the withdrawal.

The employer wishes to have an inquiry proceed into the safety officers' decision even though the officers ruled that the existing condition did not constitute a danger to the employees making the refusal. The employer seems to feel that a Board decision upholding the safety officers' decision would bring finality to the issue of

using roof bolts without supplemental steel booms and thus, if it returned to this system in the future, employees could no longer exercise the right to refuse unsafe work. The Board however does not make decisions of that nature. Our role is only to confirm the safety officer's decision or give an appropriate direction. The Board does not direct that whatever caused the initial refusal could not cause a later refusal. Of course, if an identical or similar refusal came to the Board a second time, the Board may well consider that a further inquiry is unnecessary. But this scenario is best left for the Board to deal with if it occurs.

The employer suggests that some employees are misusing the right to refuse under Part II. If in fact this is true, section 129(5) does not provide the Board with the authority to remedy this problem. The Board's authority, as previously stated, is restricted to confirming the safety officer's decision or issuing an appropriate direction. It does not include the authority to deal with alleged abuses of the right to refuse. No doubt the employer has means at its disposal to deal with such problems without the assistance of the Board. Hopefully, however, a confrontational approach can be avoided in resolving disputes over safety issues.

In Ron Dumont (1991), as yet unreported CLRB decision no. 868, the Board had the following to say about the process under Part II of the Code:

"The whole thrust of Part II of the Code is clearly to have safety and health problems resolved through informed, co-operative diagnoses and consultation in a non-adversarial atmosphere. In keeping with the spirit of the legislation the Board approached its task from the premise that safety and health issues are not negotiable. The adversarial nature of our collective bargaining system with its give and take

according to prevailing strengths is no place for the resolution of such issues. Safety and health should not have to be compromised nor should they be traded to achieve other labour relations goals. Conversely, the right to refuse under Part II ought not to be abused by using it as a tool to further other labour relations causes."

(pages 6-7; emphasis added)

The Board hopes that all concerned will take heed of the above remarks, and that both employees and employer will conduct themselves in a manner that will ensure the safest possible working conditions.

Calvin B. Davis
Calvin B. Davis
Member

DATED at Ottawa this 24th day of June 1992.

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Summary

**Canada Post Corporation, applicant,
and Bermilene Jolly, respondent.**

Board File: 530-2053

Decision No.: 941

Résumé

**Société canadienne des postes,
requérante, et Bermilene Jolly, intimée.**

Dossier du Conseil: 530-2053

Décision n° 941

A reconsideration panel of the Board referred back to the original panel in Bermilene Jolly (1991), as yet unreported CLRB no. 909, for determination, the matter of whether or not that panel in making its decision had addressed the "reasonableness" of the complainant's belief.

In a matter as straightforward as this, little time would be spent on the Board's policies and practices. However, because the reconsideration panel indicated a shift in Board practice regarding the interpretation of "reasonable cause," this panel decided to spend some time reviewing the Board's present approach to these complaints. It feels that the reconsideration panel in Canada Post Corporation (1992), as yet unreported CLRB no. 929, placed more emphasis on the reasonableness of an employee's refusal before the burden of proof of an employer under section 133(6) of the Code kicks in.

The original panel maintains that the proper approach is the one that has been previously held by the Board. The main focus of this type of complaint should be on the reasons behind the employer's decision to take disciplinary action.

The panel ruled that the complainant's refusal was based on genuine safety concerns, which meant that she did have reasonable cause to believe there was danger. The application was dismissed.

Un banc de révision du Conseil a renvoyé au banc initial qui a rendu la décision dans Bermilene Jolly (1991), décision du CCRT n° 909, non encore rapportée, afin qu'il la tranche, la question de savoir si celui-ci s'était penché sur le caractère raisonnable des inquiétudes de la plaignante.

Dans une affaire aussi simple que celle-ci, très peu de temps serait consacré à l'examen des politiques et pratiques du Conseil. Cependant, parce que le banc de révision a signalé un changement dans la pratique du Conseil relative à l'interprétation de «motif raisonnable», le présent banc a décidé de consacrer un peu de temps à l'examen de la façon dont le Conseil aborde ce genre de plaintes. Il estime que le banc de révision a, dans Société canadienne des postes (1992), décision du CCRT n° 929, non encore rapportée, insisté trop sur le caractère raisonnable du refus d'un employé avant que le fardeau de la preuve de l'employeur prévu au paragraphe 133(6) du Code entre en jeu.

Le banc initial prétend que la bonne approche est celle que le Conseil a adoptée par le passé. L'accent dans ce genre de plaintes devrait être mis sur les motifs sous-jacents à la décision de l'employeur d'imposer des mesures disciplinaires.

Le banc a jugé que le refus de la plaignante était fondé sur des inquiétudes réelles pour sa santé, ce qui veut dire qu'elle avait des motifs raisonnables de croire qu'il y avait un danger. La demande est rejetée.



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Reasons for decision

Canada Post Corporation,
applicant,
and
Bermiline Jolly,
respondent.

Board File: 530-2053

The Board consisted of Mr. Calvin B. Davis, Member, sitting as a single member panel, pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances (on record)

Mr. David I. Bloom, for the complainant; and
Mr. Ian Szlazak, for the respondent.

In Bermiline Jolly (1991), as yet unreported CLRB no. 909, this Board panel upheld a complaint filed pursuant to section 133(1) of the Code, alleging that Canada Post Corporation (CPC) had disciplined the complainant contrary to section 147(a) for exercising her right to refuse to perform unsafe work.

CPC filed a review application with the Board. A reconsideration panel consisting of Mr. J.F.W. Weatherill, Chairman, as well as Ms. Louise Doyon and Mr. J. Philippe Morneau, Vice-Chairs, dealt with that application. In Canada Post Corporation (1992), as yet unreported CLRB no. 929, the reconsideration panel referred the matter back to the original panel for determination.

"There must, for a right of refusal to arise, be found to be 'reasonable cause' for an employee's belief in the existence of danger. In the instant case, while it is clear that the original panel found that Ms. Jolly's belief

was a genuine one, it is impossible to determine whether the reasonableness of that belief was addressed. That is a factual question, and in accordance with the Board's practice in such cases, the matter is returned to the original panel for determination of that issue."

(page 5)

Normally, in a matter as straightforward as this, little time would be spent on the Board's policies and practices. However, in light of the reconsideration panel's decision where a significant shift in Board practice regarding the burden of proof in complaints of this nature is indicated, this panel feels that it is necessary to spend some time reviewing the Board's present approach to these complaints.

The reconsideration panel has indicated a shift in Board practice regarding the interpretation of "reasonable cause." This decision places more emphasis on the reasonableness of an employee's refusal before the burden of proof on employers under section 133(6) of the Code kicks in:

"... By section 133(6), the burden of proof is on the party alleging that the contravention did not occur, and in this case the employer so alleges. Before the employer need meet this onus, however the employee must satisfy the Board that, to use the language of section 147(a)iii), she 'has acted in accordance with this part', and in particular, to use the language of section 128(1)b), that she had 'reasonable cause to believe' that a condition existed which constituted a danger to her."

(page 3; emphasis added)

The reconsideration panel went on to say that a "refusal, to have the protection of the Code, must be made in circumstances where there is 'reasonable cause' for such belief" and, that "there must, for a right of refusal to arise, be found to be reasonable cause for an employee's belief in the existence of danger." The significance of

these remarks can only be fully appreciated when they are viewed in the context of the Board's longstanding policies in this regard.

Section 128(1) contains the provision dealing with an employee's right to refuse under Part II of the Code:

"128. (1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place."

Section 147 of the Code provides:

"147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

(i) has testified or is about to testify in any proceeding taken or inquiry held under this Part,

(ii) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the safety or health of that employee or any of his fellow employees, or

(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part; ..."

(emphasis added)

The Board's policy and practice regarding complaints alleging that an employer has violated section 147 by disciplining an employee for having exercised the right to refuse to work have been well documented. Key to the

Board's approach is the broad interpretation to be given to the words found in section 128(1), "has reasonable cause to believe."

The purpose of the legislation, which is to prevent accidents and injury in the work place, can be best achieved if employees are not discouraged from identifying potential hazards by placing an onus on them to prove at a later date that their fears for their safety and health were well founded. The Board has said that the main focus of this type of complaint should be on the reasons behind the employer's decision to take disciplinary action rather than on the reasonableness of the employee's refusal. (See William Gallivan (1981), 45 di 180; and [1982] 1 Can LRBR 241 (CLRB no. 332); Roland D. Sabourin (1987), 69 di 61 (CLRB no. 618); and John Charters et al. (1989), 76 di 188; and 3 CLRBR (2d) 253 (CLRB no. 727), upheld in Canada Post Corp. v. Letter Carriers' Union of Canada (1990), 111 N.R. 345 (F.C.A.).)

The language of section 147 of the Code is clear and unequivocal. Employers are prohibited from disciplining in any shape or form employees for having exercised rights under the Code. This protection was surely not intended to be dependent on the correctness of an employee's often spur-of-the-moment reaction to the perception of danger. In William Gallivan, supra, the Board said that it is not unreasonable to be wrong when dealing with matters affecting the safety and health of employees and, provided that a refusal is based on genuine safety concerns, the employee should receive the full protection offered by the Code, even if the concern is later judged to be unfounded.

As has been pointed out in several decisions, this approach by the Board is in keeping with the way in which

the Ontario Labour Relations Board deals with these situations.

"... The concept of insubordination is singularly inappropriate in situations where an employee is refusing to work in an honest (although mistaken) belief that his health or safety may be threatened. We accept the view ... that in such matters one should err on the side of caution and prudence. An employee should not be penalized for doing so, nor should this Board be unduly concerned if bona fide concerns for employee safety result in occasional disruptions of the employer's production process. ..."

(General Motors of Canada Limited, [1980] OLRB Rep. May 700; page 709)

That rationale appears to be sound. Therefore, the Board should not allow itself to be distracted from the real issue in these complaints, which is the prohibition against reprisals, by placing too much emphasis on the usual first-line defence raised by employers that the employee had no reasonable grounds to believe that danger existed. This panel agrees with what was said in Roland D. Sabourin, supra, that the only onus on a refusing employee should be to satisfy the Board that the refusal was motivated by genuine safety concerns. In other words, if the refusal is bona fide, the cause for the refusal must surely be deemed to be reasonable for the purposes of a complaint under section 147 where the employer must assume the burden of proof.

"133.(6) A complaint made pursuant to subsection (1) in respect of an alleged contravention of paragraph 147(a) by an employer is itself evidence that that contravention actually occurred and, if any party to the complaint proceedings alleges that the contravention did not occur, the burden of proof thereof is on that party."

Under Part I of the Code, which contains similar prohibitions against employer disciplinary action and an identical burden of proof on employers that challenges the

validity of a complaint, the whole focus is on the employer's conduct in response to the exercise of those rights, not on how they were exercised. This panel sees no reason to adopt a different approach to complaints under Part II.

The Board's longstanding practice of looking primarily to the motive behind a refusal to determine reasonable cause is the correct way to deal with these refusals when faced with alleged violations of section 147. To insist now on a test of reasonable cause, within its literal meaning, can only lead to an unwillingness on the part of employees to speak up in marginal circumstances when they know they can be disciplined if they fail to satisfy the Board of the reasonableness of their actions. This would be contrary to the spirit of Part II of the Code. In fact it is hard to contemplate what standard of reasonable cause this Board could set considering that the safety and health of employees is at stake. What may seem to be unreasonable to an employer or to the Board could prevent accidents and even save lives.

In the particular circumstances of this case that has been referred back to the original panel for reconsideration, there is no need to deal further with Bermiline Jolly's refusal. The benefit of the doubt went to Ms. Jolly because of the sincerity of her concerns about her safety. Also taken into account was the fact that CPC did not fulfil its obligation under the Code to investigate her concerns. CPC simply disciplined her.

Her refusal was based on genuine safety concerns, which to this panel means that she did have reasonable cause to believe there was danger. No matter how minor or frivolous that danger may seem to the employer, she still

is entitled to the protection of the Code.

There being nothing new raised by Canada Post in this application for reconsideration that was not before the Board when it arrived at the original decision, the application is dismissed.

Calvin B. Davis
Calvin B. Davis
Member of the Board

DATED at Ottawa, this 30th day of June 1992.

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